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THE

CONVEYANCING ACTS, 1881, 1882,

THE VENDOR AND PURCHASER ACT, 1874,
THE LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888,
THE TRUSTEE ACT, 1888,
THE MARRIED WOMEN'S PROPERTY ACT, 1882,

AND

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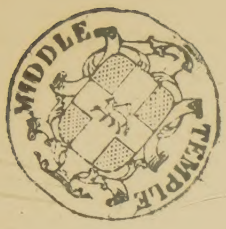

PREFACE TO THE FIFTH EDITION.

THE Conveyancing Acts and the Settled Land Acts have now been in force for a time sufficient to render it no longer necessary to illustrate their operation by precedents of deeds. Therefore the Precedents contained in the previous editions of the two books on the Conveyancing Acts and Settled Land Acts are omitted and both sets of Acts with the notes are included in the present volume, leaving the Precedents to be issued at a future day as a separate volume.

When the Bills for these Acts were first introduced in 1880, many zealous advocates of reform in the Land Laws objected that the proposed enactments were only amendments of an old and cumbrous system, and that an entirely new system must be substituted. Nine years have passed and no new system has yet been established or appears likely to be established. The most perfected new system, namely, that introduced by Lord Cairns' Act of 1875, and upon which the recent Government Bills have been modelled, was a failure as regards extensive usefulness, not because there was any indisposition to adopt it, for it has been adopted in many cases where suitable, but because it did not answer the general

requirements of Landowners. In the recent Bills it was sought to hide failure by resorting to compulsion, and the result is that the Bill of this Session has failed to pass the House of Lords mainly on account of the compulsory clauses. But compulsion would only render failure more certain; every hindrance, mistake, or delay would be magnified by discontented persons compelled to adopt a new system against their will. Delay at least there must often be in a Government legal office, where the staff would be kept down to the lowest possible limit.

If a Land Register is to be established the true course is to make its user voluntary and to follow the example afforded by the Stock Register kept by the Bank of England. The Register should be kept by a Public Company who should deposit with the Government a large portion of their capital as a guarantee fund, and be allowed to make a small profit on all transactions. The Company should also be a general Guarantee and Trust Company, and would insure to each registered owner the value of his land in case he is dispossessed, and also insure him against incumbrances. For its own sake the Company would conduct the business of registration properly in order to attract business; it would give the utmost possible facilities for first registration and subsequent dealings with land, and on first registration would, in consideration of an insurance premium, take the risk of possible or contingent charges, and also either for or without a premium take the risk of registering titles, practically safe, though not technically good. This latter risk the Registrar in a Government office will never take, having over him the fear of the Chancellor of the Ex-

chequer, should a claim be made under the guarantee of title.

Besides establishing a Register of the kind above suggested, further amendments may usefully be made in the existing law. Even in its present shape that law gives many facilities for dealings with land which could not be obtained in a Register Office. There is no reason why each system old and new should not be capable of application to the cases in which it is most suitable.

July, 1889.

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ABBREVIATIONS.

C. A.	*means*	..	The Conveyancing and Law of Property Act, 1881.
C. A., 1882 ..	„	..	The Conveyancing Act, 1882.
C. L. P. A. ..	„	..	The Common Law Procedure Act, 1852.
C. L. P. A., 1860	„	..	The Common Law Procedure Act, 1860.
M. W. P. A. ..	„	..	The Married Women's Property Act, 1882.
M. W. P. A., 1884	„	..	The Married Women's Property Act, 1884.
R. S. C. ..	„	..	Rules of the Supreme Court.
S. E. A. ..	„	..	The Settled Estates Act, 1877.
S. L. A. ..	„	..	The Settled Land Act, 1882.
S. L. A., 1884	„	..	The Settled Land Act, 1884.
S. L. A., 1887	„	..	The Settled Land Acts (Amendment) Act, 1887.
V. & P. A. ..	„	..	The Vendor and Purchaser Act, 1874.

ADDENDA.

Page 43, *at end of* C. A., s. 9, *add* As to the terms on which an equitable tenant for life, as between himself and his co-trustees, is entitled to the custody of title deeds: see *Re Burnaby*, W. N. 1889, 124.

Page 46, C. A., s. 14. A lessee entitled to his lease under an agreement for a lease, and from whom rent has been accepted by the lessor, is in the position of an actual lessee as from the day when the rent was paid, and is entitled to the benefit of C. A., s. 14: *Strong* v. *Stringer*, W. N. 1889, 135.

Page 94, C. A., s. 43. An executor who, after payment of debts, funeral and testamentary expenses, and legacies, holds net residue in trust for an infant, is a trustee within the meaning of C. A., s. 43: *Re Smith, Henderson-Roe* v. *Hitchins*, W. N. 1889, 141; 33 Sol. J. 575.

Page 98, C. A., s. 45 (2). It is understood that the Land Commissioners do not act under this subs. (2). Clearly the subs. applies to cases where there is a trust for sale. The trustees are empowered "to dispose thereof absolutely," and also to give "an absolute discharge for the capital value," and are also the persons entitled to the rent, and consequently the persons to whom notice is to be given, and tender is to be made. Where there is a power of sale in trustees of a settlement, or in the tenant for life under the Settled Land Acts, it is conceived that the tenant for life and the trustees together are the persons "empowered to dispose thereof absolutely," and are the persons entitled to the rent, and to whom notice is to be given.

Page 183, *at end of par.* (13), *add* But see *Re Dixon, Byram* v. *Tull*, W. N. 1889, 142.

Page 227, *l.* 14; *page* 250, *l.* 1; *page* 276, *l.* 12; *Cardigan* v. *Curzon-Howe* is reported on appeal, 41 Ch. D. 375.

Page 264, S. L. A., s. 34. This s. 34 is the same in effect as s. 74 of the Lands Clauses Consolidation Act, 1845, and as to the rights of a tenant for life of a leasehold in the proceeds of sale under this sect. see *Re Phillips*, L. R. 6 Eq. 250; Seton, 1435, 4th ed.

PART I.

VENDOR AND PURCHASER

AND

CONVEYANCING ACTS.

CHAPTER I.

GENERAL EFFECT OF THE VENDOR AND PURCHASER ACT, 1874, AND THE CONVEYANCING ACTS, 1881, 1882.

Effect of V. & P. A., C. A. and C. A. 1882, on form and contents of documents.

THE following is a short statement of the manner in which the V. & P. A., the C. A., and the C. A., 1882, affect the form and contents of various documents (*a*).

Contracts.

(1.) Contracts for sale need not contain conditions as regards title and evidence of title except in special cases, as where the title is less than forty years, or where deeds abstracted cannot be produced, &c.: C. A., s. 3. An open contract may be safely made in case of an ordinarily good forty years' title, but it is advisable in all cases to state the date of commencement (see note to C. A., s. 3 (3)), and it is necessary to state it in the following cases:—

(*a*) Advowsons or reversionary interests (Dart, 334, 335, 6th ed.).

(*b*) Tithes or other property derived from the Crown where evidence of the Crown grant is to be negatived.

(*c*) Where the document first abstracted is a will and

(*a*) See the meaning of abbreviations stated at the end of the Table of Cases, *supra*.

evidence of seisin is to be precluded: *Parr* v. *Lovegrove*, 4 Drew. 170.

(*d*) Where the document first abstracted is a voluntary settlement, or articles for a settlement, or a conveyance under a power or trust for sale, or the bar of an entail, or other document of a similar kind, deriving its effect from some prior instrument.

If the date be not fixed, the date of a recited deed may be the time prescribed by V. & P. A., s. 1 (see the last clause of that s.), and an abstract of the deed may be required. The safest course is always to fix the date of commencement. In cases under (*d*) it is necessary (*Marsh and Earl Granville*, 24 Ch. D. 11, 21), and in all cases it is best, to state the nature of the instrument with which the title commences. A good commencement helps to satisfy a purchaser.

Abstracts.

(2.) With the above exceptions abstracts of title commence—

(*a*) As to freeholds with a document at least forty years old: V. & P. A., s. 1.

(*b*) As to leaseholds for years with the lease or underlease: V. & P. A., s. 2, r. 1, and C. A., s. 3 (1).

(*c*) As to the freehold interest in enfranchised copyholds or customary freeholds with the deed of enfranchisement: C. A., s. 3 (2).

Seisin of testator.

But where the abstract commences with a will no alteration in the practice is made, consequently evidence of seisin may or may not be required, according to circumstances, and a clause preventing any requisition on this point may still be necessary.

Leaseholds.

(*d*) A lease or underlease is to be deemed *primâ facie* good, the last receipt for rent being evidence of performance of covenants, and, in case of an underlease, of performance also of covenants in the superior lease up to the date of actual completion of the purchase: C. A., s. 3 (4), (5).

(3.) Recitals

Recitals.

(*a*) Of facts in documents, as to *land or hereditaments*, twenty years old are evidence: V. & P. A., s. 2, r. 2.

(*b*) Of documents, as to *any property*, dated prior to the legal or stipulated time for commencement of the abstract are to be taken as correct, and production is not to be required: C. A., s. 3 (3).

(4.) Expenses

Expenses.

Of evidence required in support of the abstract and not in the vendor's possession are thrown on the purchaser: C. A., s. 3 (6).

(5.) In documents after 1881 there need be

What clauses to be omitted in documents.

(*a*) No general words: C. A., s. 6.

(*b*) No all estate clause: C. A., s. 63.

(*c*) No special directions as to the mode of sale in a trust or power for sale, but only the words "Upon trust to sell" or "With power of sale," as the case may be: C. A., s. 35.

(*d*) No receipt clause: C. A., ss. 22, 36.

(*e*) No mortgage joint account clause: C. A., s. 61.

(*f*) No power to survivors or survivor of several executors or trustees to do any act: C. A., s. 38; nor to "assigns." New trustees duly appointed have all the powers of the original trustees, ss. 30, 31 (5), and (except so far as s. 30 is repealed in the case of copyhold or customary land by 50 & 51 Vict. c. 73, s. 45) there can now be no assign by devise of a trust estate. Powers may be given simply to trustees, their executors or administrators.

(*g*) No mention either of heirs, executors, administrators, or assigns, whether of covenantor or covenantee, obligor, or obligee, nor of the survivors or survivor of several covenantees or obligees, nor of the heirs, executors, or administrators of the survivor, nor of their or his assigns, need be made in covenants or bonds:

C. A., ss. 58, 59, 60; except where a restrictive (*a*) covenant is intended to be made binding so far as the law allows on the land, and then the assigns of the covenantor should be mentioned.

What words or clauses unnecessary.

(*h*) No particular technical operative word is required to pass a freehold: C. A., s. 49.

(*i*) No necessity for the word "heirs," "heirs of the body," &c., to create an estate of inheritance. (But on this point there is still a distinction between a deed and a will. In a deed the estate to be limited must still be described accurately as "fee simple," "in tail," &c., or as before the C. A., and cannot be created, as in a will, by informal expressions): C. A., s. 51.

(*k*) No multiplication of receipt clauses for consideration. One receipt in the body of the deed or indorsed is sufficient: C. A., ss. 54, 55.

(*l*) No power to executors or trustees to compound or compromise (*contrà* as to administrators): C. A., s. 37.

(*m*) No remedy for the recovery of rent-charges: C. A., s. 44.

(*n*) No powers for the receipt or application of income, nor for the accumulation of surplus income during minority: C. A., ss. 42, 43 (*b*).

Covenants for title.

(6.) Covenants for title are not required, but by stating the character in which a person conveys the proper covenant by him is incorporated: C. A., s. 7.

Covenant to produce deeds.

(7.) A covenant for production of deeds is no longer required. A mere acknowledgment as defined by the Act gives the proper title to production and delivery of copies, and a mere undertaking gives the proper remedy in case of destruction or damage: C. A., s. 9.

(*a*) Whether any other covenant can be made binding on the land, see *London and S. W. Railway Company* v. *Gomm*, 20 Ch. D. 562, and second note to C. A., 1881, s. 58, *infra*.

(*b*) But where any trust of the accumulated rents and profits other than those stated in s. 42 (5) iii. is required, it must be mentioned.

(8.) In a mortgage by *deed* there are supplied — Powers conferred on mortgagors and mortgagees.

(*a*) Power for mortgagor and mortgagee when in possession to grant leases: C. A., s. 18. In some cases it may be necessary to vary this power; but it is conceived that the power ought not in any case to be entirely negatived (*a*).

(*b*) Power for mortgagee to sell and to insure against fire, and when in possession to cut and sell timber: C. A., ss. 19, 23.

(*c*) Power for mortgagee to appoint a receiver: C. A., ss. 19, 24.

(*d*) Power for mortgagee to give a receipt for sale money and other money comprised in the mortgage, and trusts for application thereof: C. A., s. 22.

(9.) In a will, a devise of trust and mortgage estates is not required and should not be inserted except in the case of copyhold or customary land to which there has been an admission, and is practically inoperative if inserted: C. A., s. 30. — Devise of trust and mortgage estates.

(10.) As to appointments of new trustees, — Appointment of new trustees.

(*a*) A power to appoint is only required where it is to be exercised otherwise than by the trustees or trustee for the time being: C. A., s. 31 (1).

(*b*) The original number of trustees need not be preserved, except that where there were originally two or more, one cannot be discharged unless two places at least be full: C. A., s. 31 (3).

(*c*) An appointment of new trustees should contain the proper declaration as to vesting: C. A., s. 34; and where there are more than two trustees, and one simply retires and his place is not filled up, there must be a deed of consent to his discharge and to the vesting of the trust property in his co-trustees: C. A., s. 32.

(*d*) On a general appointment of new trustees a — Separate trustees.

(*a*) See *Corbett* v. *Plowden*, 25 Ch. D. 678.

separate set of trustees may at any time be appointed for each distinct trust: C. A., 1882, s. 5.

Powers of attorney.

(11.) As to powers of attorney,

(*a*) A power given for valuable consideration can be made irrevocable in favour of a purchaser, lessee, or mortgagee: C. A., 1882, s. 8.

(*b*) Any power of attorney can, in favour of the same persons, be made irrevocable for any period not exceeding one year from its date: C. A., 1882, s. 9.

(*c*) The attorney may sign and seal in his own name: C. A., s. 46.

(*d*) Access to a power of attorney is enabled by means of deposit in the Central office, and office copies can be obtained: C. A., s. 48.

Executory limitations.

(12.) In instruments after 1882 an executory limitation over of an estate in fee, or for a term, on failure of issue, becomes incapable of effect when any of the issue attain the age of twenty-one years: C. A., 1882, s. 10. This section applies only to land or hereditaments.

Disclaimer of powers.

(13.) Powers, whether coupled with an interest or not, can be disclaimed, in like manner as an estate can be disclaimed: C. A., 1882, s. 6.

Supplemental deeds.

(14.) Deeds may be supplemental or annexed instead of indorsed, and will be read as indorsed on, or recited in, the principal deed: C. A., s. 53.

CHAPTER II.

THE VENDOR AND PURCHASER ACT, 1874.
37 & 38 VICT. c. 78.

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land. [7th August, 1874.]

SS. 1, 2.

WHEREAS it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

Definition of "land" in Acts of Parliament.

By 13 and 14 Vict. c. 21, s. 4, the word "land" in Acts of Parliament passed since 1850 includes messuages, tenements and hereditaments, houses and buildings of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure.

Rules for regulating obligations and rights of vendor and purchaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

S. 2.

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

Rule that lessee has notice of lessor's title not altered.

The rule that a lessee has constructive notice of his lessor's title has not been altered by this s. He is now in the same position with regard to notice as if he had before this Act stipulated not to inquire into his lessor's title (*Patman* v. *Harland*, 17 Ch. D. 353, 358). Sect. 3 of C. A., 1882, as to notice makes no alteration in this respect. It does not operate in favour of a person who enters into a contract whereby he precludes himself from "making such inquiries and inspections as ought reasonably to have been made;" see subs. (1) (i).

Underlease.

As to a contract for an underlease, see C. A., s. 13.

Contract for lease under power.

By s. 4 of C. A., 1882, the contract for a lease made under a power does not form part of the title to the lease.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

Effect of recital twenty years old.

In *Bolton* v. *London S. Board*, 7 Ch. D. 766, a recital in a deed more than twenty years old that a vendor was seised in fee simple was held sufficient evidence of that fact, precluding the purchaser from demanding a prior abstract, except so far as the recital was proved to be inaccurate. The decision seems open to question, as it in effect negatives the recognised right of a purchaser to a proper abstract of title extending over forty years, which might shew the recital to be inaccurate.

As to the effect of a recital under this s., see also *Re Marsh and Earl Granville*, 24 Ch. D. 11.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Purchaser's equitable right to production of documents.

As to the purchaser's equitable right to production of documents, see Sug. V. & P. c. 11, s. 5, 14th ed.; Dart, 160, 6th ed.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

Acknowledgment substituted for covenant.

Contracts for sale, where the vendor retains any documents, should now provide for giving an acknowledgment in writing of the right of the purchaser to the production, and delivery of copies under C. A., s. 9, and, where he is beneficial owner, also an undertaking for safe custody. The liability to give the covenant under s. 2, r. 4 of this Act, if incurred after 1881, is satisfied by an acknowledgment (C. A., s. 9 (8), (14)).

As to the costs of attested and other copies of documents retained by the vendor, see C. A., s. 3 (6).

Trustees may sell, &c., notwithstanding rules.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.

Legal personal representative may convey legal estate of mortgaged property.

4. *The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.*

Repealed and superseded by s. 30 of the C. A. as to deaths happening after 1881, which s. has in its turn been repealed by s. 45 of the Copyhold Act, 1887, so far as regards copyhold or customary land to which the mortgagee has been admitted. Such land now remains in the same position with respect to its devolution on death of the mortgagee as before the V. & P. A. The repeal did not revive or affect this s. of the V. & P. A. (see 13 & 14 Vict. c. 21, s. 5) which remains operative as regards deaths between the 7th August, 1874, and the 1st January, 1882.

This section did not apply to a transfer of mortgage: *Re Spradbery's Mortgage*, 14 Ch. D. 514.

Bare legal estate in fee simple to vest in executor or administrator.

5. *Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in*

SS. 5, 6.

the legal personal representative from time to time of such trustee.

The expression "seised in fee simple" excluded copyholds and customary freeholds from the operation of this s.

Repealed as to England on and after the 1st January 1876, by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48, except as to anything duly done thereunder before that date. Re-enacted by the same s. with an amendment confining its operation to a bare trustee dying intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, which s. has in turn been repealed by the C. A., s. 30, in case of deaths occurring after 1881. It would seem therefore that where nothing had been done under this s. before the 1st January, 1876, the hereditament of a bare trustee dying testate, and vested in his personal representative solely by force of this s., became divested and devolved as if the V. & P. A. had not been passed. Thus, up to the 1st January, 1882, where nothing had been done under this repealed s. before the 1st January, 1876, the devise by a bare trustee of his trust estate is operative.

Repealed as to Ireland by the C. A., s. 73, in case of deaths happening after 1881.

Meaning of "bare trustee."

There is no distinction now between the case of a bare trustee and any other trustee dying after 1881. A bare trustee is a trustee to whose office no duties were originally attached, or who although such duties were originally attached to his office would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction, and has been requested by them so to convey it: Dart, 587, 6th ed.: and see *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582, 585, per M.R.; but in the opinion of V.C. Hall the words "has been requested by them so to convey it" are not a necessary ingredient in the definition of a bare trustee: *Christie* v. *Ovington*, 1 Ch. D. 279. A trustee with a beneficial interest in the trust estate is not a bare trustee within the Land Transfer Act, 1875, s. 48, which replaced s. 5 of the V. & P. A. (*Morgan* v. *Swansea, &c., Authority, ubi sup.*); nor is the husband of a married woman who is seised in her right a bare trustee within the Act 3 & 4 Will. 4, c. 74, s. 34 (*Keer* v. *Brown*, Johns, 138).

Married woman who is a bare trustee may convey, &c.

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.

This s. applies only to trust estates devolving before 1883.

The aid of this s. is now only required in case of trust estates devolving on a married woman before 1883. As to all trust estates, whether freehold, copyhold or leasehold, devolving on her after 1882, she is in every respect in the same position as a feme sole: M. W. P. A., ss. 1, 18.

Though a married woman who is trustee under a trust for sale takes an interest in the proceeds of sale she is nevertheless a bare trustee

within this s. where the sale is made under an order of the Court: *Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693. SS. 6, 7, 8.

7. *After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.* Protection and priority by legal estate and tacking not to be allowed.

Repealed as to England by the Land Transfer Act, 1875, s. 129, and as to Ireland by the C. A., s. 73. In force in England between 7th August, 1874, and 1st January, 1876. The effect of this s. was to prevent a first mortgagee from being safe in making a further advance, his security for which became under this s. postponed to all intermediate mortgages; as to which, consider *Pease* v. *Jackson*, 3 Ch. App. 576, and *Hosking* v. *Smith*, 13 App. Cas. 582.

It is conceived that this s. did not, while in force, wholly abolish the protection given to a purchaser having the legal estate without notice of an equitable charge, but applied only to the case of two distinct interests, one of which could not stand alone without being protected by the other.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law. Non-registration of will in Middlesex, &c. cured in certain cases.

As to the time allowed for the registration of wills in Middlesex, see 7 Anne, c. 20, ss. 8–10, and for the registration of wills in the W. Riding of Yorkshire, 2 & 3 Anne, c. 4, ss. 20, 21; in the E. Riding, 6 Anne, c. 35, ss. 14, 15, and in the N. Riding, 8 Geo. 2, c. 6, ss. 15–17, in the case of testators dying before 1st January, 1885. The time allowed for the registration in the three Ridings of Yorkshire of wills of testators dying on or after that day is now governed by the Yorkshire Time for registration of wills in Middlesex and Yorkshire.

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Registries Act, 1884 (47 & 48 Vict. c. 54) ss. 11, 14, as amended by 48 Vict. c. 4, and the Yorkshire Registries Amendment Act, 1885, (48 & 49 Vict. c. 26).

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Cases under this s.

In proceedings under this s. the parties are in the same position as under a reference as to title in an action for specific performance, and accordingly evidence by affidavit is admissible (*Re Burroughs, &c.*, 5 Ch. D. 601). As to recovery under this s. of interest wrongly paid see *Young and Harston's Contract*, 29 Ch. D. 691, 31 *ib.* 168. The deposit may be recovered with interest: *Re Smith and Stott*, 29 Ch. D. 1009 *n.*; *Hargreaves and Thompson's Contract*, 32 *ib.* 454, but see *Re Davis & Cavey*, 40 *ib.* 601; and the purchaser may be allowed his costs of investigating the title: *Higgins and Hitchman's Contract*, 21 Ch. D. 99; *Re Yeilding and Westbrook*, 31 *ib.* 344; *Hargreaves and Thompson's Contract, ubi sup.* and the validity of a notice to rescind may be decided: *Re Jackson and Woodburn's Contract*, 37 Ch. D. 44; but not a question as to the destination of the purchase-money if it does not concern the purchaser: *Re Tippett and Newbould's Contract*, *ib.* 444.

Extent of Act.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

CHAPTER III.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.
44 & 45 VICT. c. 41.

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.

[22nd August, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

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PRELIMINARY.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

Interpretation of property, land, &c.

2. In this Act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest:

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

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For the meaning of "land" in Acts of Parliament see 13 & 14 Vict. c. 21, s. 4, *supra*, p. 7.

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

Reputed manor.

Where all the freehold estates held of a lord are purchased by him or devolve on him by escheat, whereby the services become extinct, the manor ceases to exist; also, there cannot be a manor without a court baron; and no court baron can be without two freeholders as suitors at least. In case there be not two suitors the manor becomes a reputed manor, or manor in reputation; and continues to have certain rights and franchises which were appendant to the manor (1 Cruise, Dig. p. 34), as the right to wrecks, estrays, &c.: 1 Watk. Cop. 27; and the right to appoint a sexton of a parish: *Soane* v. *Ireland*, 10 East, 259; and if there be but one free tenant the seigniory as to him remains with respect to his services, though there can be no court held: 1 Watk. Cop. 27.

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

See exceptions to this definition of conveyance, s. 7 (5), p. 36.

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure, award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document

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include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

As to the exercise of the powers of the Court in regard to land in the County Palatine of Lancaster see s. 69 (9), and as to the application of this Act to Ireland see s. 72.

Singular includes plural, &c.

In Acts of Parliament passed after 1850 singular includes plural, plural singular, masculine includes feminine, and month means calendar month unless the contrary is expressed: 13 & 14 Vict. c. 21, s. 4.

II.—Sales and other Transactions.

SALES AND OTHER TRANSACTIONS.

Contracts for Sale.

Contracts for Sale.

Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

Title to underlease.

This is supplementary to s. 2, rule 1, of V. & P. A., and (following that Act) does not apply to a lease for lives. It places the title to an underlease, in regard to shewing the lessor's title, on the same footing as the title to a lease from the freeholder (see also s. 13 of this Act), and the underlessee has in like manner constructive notice of his underlessor's title (*Patman* v. *Harland*, 17 Ch. D. 353). As to the effect of C. A., 1882, s. 3, see note to V. & P. A., s. 2, r. 1.

How far objections, &c., are precluded.

This and subs. 3 preclude the purchaser from calling for or making any requisition, objection, or inquiry as to the underlessor's title, as between vendor and purchaser, but it does not alter the rule enabling the purchaser to prove the lease to be defective *aliunde* (see first note to subs. 3).

Contract for lease under power not part of title.

By s. 4 of C. A., 1882, a contract for a lease made under a power is excluded from forming part of the title to the lease.

Title to enfranchised copyholds.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

Under this subs. the title to the freehold of enfranchised copyholds is placed on the same footing as the title to a lease, and commences with the deed of enfranchisement. This subs. should be read in con-

nection with subs. 3, under which a purchaser is precluded from requiring production of documents recited in the enfranchisement deed, and is bound to assume the correctness of the recitals.

* The word "purchaser" in this and the subsequent subss. of this s. means (notwithstanding the definition clause) a purchaser on a sale only (see subs. 8).

A copyholder obtaining enfranchisement after 1881 is not entitled in the absence of an agreement to a statutory acknowledgment of the right to production of the freehold title: see *Re Agg-Gardner*, 25 Ch. D. 600, 604. (The head-note is inaccurate.)

The following subss. 3, 6, 7, are not confined to land.

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* Meaning of purchaser in this s.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law (*a*), or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.

Notice of a document being constructive notice of all its contents (Sug. V. & P. 775, 14th ed.), a purchaser would, but for this subs., be entitled on an open contract to require the production of all documents recited or noticed. But this clause will not protect the vendor where a defect in the prior title appears on the face of the abstract (*Sellick* v. *Trevor*, 11 M. & W. 722; Dart, 172, 6th ed.), nor affect the purchaser's right to object to the earlier title if he can shew it to be defective

Production of documents recited or noticed prior to commencement of title.

(*a*) That is for lands or hereditaments, forty years, except where an earlier title than sixty years would have been required before the V. & P. A. See s. 1 of that Act.

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aliunde: *Darlington* v. *Hamilton*, Kay, 550, and cases cited at p. 558; *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515; *Harnett* v. *Baker*, L. R. 20 Eq. 50; *Jones* v. *Clifford*, 3 Ch. D. 779; *Broad* v. *Munton*, 12 Ch. D. 131; *Nottingham &c., Co.* v. *Butler*, 15 Q. B. D. 261, 16 *ib.* 778; *Re Davys and Verdon to Sawin*, 17 L. R. Ir. 334; or where the defect is accidentally disclosed by the vendor: *Smith* v. *Robinson*, 13 Ch. D. 148. This right he retains under subs. 11, and if intended to be precluded it must be expressly provided for (*Hume* v. *Bentley*, 5 De G. & S. 520).

Contract should still fix date for commencement of title.

It is still advisable to provide expressly in all contracts as to the date at which the title is to commence. The V. & P. A. leaves it open to require an earlier title than forty years in cases similar to those in which an earlier title than sixty years could previously have been required. Thus where the first abstracted deed is a conveyance under a trust for sale, or under a power, or the bar of an entail, the purchaser is entitled to production, if not to an abstract, of the deed creating the trust or power or estate tail, and it may be said that the date of this deed is the time prescribed by law for commencement of the title (see *Parr* v. *Lovegrove*, 4 Drew. 170). A voluntary deed dated less than forty years back is not a proper commencement of the title, where no indication of the nature of the instrument is given by the contract: *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) Where land sold is held by under-lease the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease,

have been paid and duly performed and observed up to that date.

Lease at a nominal rent.

Subss. 4 and 5 cover breaches after the contract and up to completion in all cases where a rent is reserved, see *Lawrie* v. *Lees*, 14 Ch. D. 249, 7 App. Cas. 19. But they do not apply to the exceptional case of a lease at a peppercorn rent (*Moody & Yates' Contract*, 28 Ch. D. 661, 30 *ib.* 344), and in such a case it should be expressly provided that the mere fact of possession at the time of completion of the purchase is to be sufficient evidence of performance.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

As to the expense of producing documents and of attested copies which, but for this clause, would be borne by the vendor, see Dart, 159, 6th ed. This subs. alters the rule as to the expense of journeys established by *Hughes* v. *Wynne*, 8 Sim. 85.

Expenses of production.

Subs. 6 only relates to expenses in reference to documents and abstracts of documents not in possession of the vendor, but of which he can procure the production, as deeds in the possession of a mortgagee: *Re Willett & Argenti*, W. N. 1889, 66. In the case of *Johnson & Tustin*, 28 Ch. D. 84, Pearson, J., considered that this subs. enabled a vendor who had no deeds in his possession except the conveyance to himself to throw on the purchaser the whole expense of

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making an abstract of the prior title, but this decision was reversed: 30 *ib.* 42. If there are any documents of which the vendor cannot procure the production he must protect himself against production by a special condition.

Where documents cannot be produced.

* Where the lessee covenants to complete a house to the satisfaction of the lessor's surveyor, the certificate of the surveyor as to completion is part of the title and it must be obtained at the vendor's expense: *Moody & Yates' Contract*, 28 Ch. D. 661, 30 *ib.* 344.

Negative searches in the Irish Deeds Registry must be furnished at the vendor's expense: *Murray & Hegarty's Contract*, 15 L. R. Ir. 510.

* Cases not within this subs.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchases on sales properly so called, notwithstanding any interpretation in this Act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

Meaning of "sale made."

A sale is made when there is a complete contract for sale. The purchase-money then becomes personal estate of the vendor, and the land then becomes real estate of the purchaser: see *Lysaght* v. *Edwards*, 2 Ch. D. 507, and note to s. 4.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

Effect of an open contract since the Act.

Under this s., taken in connection with the V. & P. A., and in particular ss. 1 and 2 of that Act, a vendor having a title such as is usually accepted by a willing purchaser, may safely enter into an open contract for sale, without fear of being put to undue expense in answering requisitions or furnishing evidence. At the same time the

purchaser will not incur more risk than in buying under suitable conditions of sale, since subs. 11 reserves to him every defence in an action for specific performance: see first note to subs. 3 of this s.

* Trustees may buy or sell under contracts within this s., see s. 66, and as to contracts under the V. & P. A., s. 2, see s. 3 of that Act.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

* Trustees protected.

Completion of contract after death.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

When vendor not trustee.

This s. should be read in connection with s. 30, and is not rendered unnecessary by that s. A vendor who has contracted to sell is not a trustee unless the contract is valid and binding on *both* parties at his death (*Lysaght* v. *Edwards*, 2 Ch. D. 506). If the title be not accepted in the vendor's lifetime, or be not such as he could have enforced, he is not a trustee, though after his death the purchaser should accept the title, nor would the vendor be a trustee where the contract is not signed by, and so is not enforceable against, the purchaser: *ib.* 507. But in either case it might be enforceable by the purchaser.

The s. applies to all cases where there is a contract "enforceable against the heir or devisee," that is at least to all cases where there is a clear written contract signed by the deceased vendor. The purchaser may then waive all objections and insist on performance, and an action will not now be required merely to obtain the legal estate where the vendor has died, having devised the land in settlement or otherwise in such manner that no conveyance can be obtained. But if there is any doubt whether a contract binding on the vendor subsisted at his death, an action will still be necessary. This might happen in case of a parol contract and alleged part performance. Matters are in fact placed in the same position as if there was a devise of the fee to trustees.

Case where action may still be necessary.

Where the legal estate is outstanding at the time of the vendor's death, the aid of this s. is not required. The person in whom it is outstanding can convey, and the personal representative can give a discharge for the purchase-money. This makes a complete title.

This s. not required where legal estate is outstanding.

* Does not apply to tenant in tail or copyholds.
† Estates *pur autre vie.*

* The s. does not apply to a contract by a tenant in tail which by his death becomes incapable of being enforced. Nor does it apply to copyholds.

† It applies, however, to an estate *pur autre vie* where it would devolve on the heirs general as special occupants, which is a *quasi* descent: Burton, 295, *D.* d. *Hunter* v. *Robinson*, 8 Barn. & Cr. 296. If the executors or administrators take as special occupants the aid of this s. is not required. Leaseholds for lives devised in settlement are usually vested in trustees, in which case also a conveyance can be made independently of this s.

The s. does not apply to the peculiar case of the vendor having a power of appointment which he does not exercise, the property being settled in default of appointment: see *Morgan* v. *Milman*, 3 D. M. & G. 24; Fry, Spec. Perf., 2nd ed., p. 68.

Discharge of Incumbrances on Sale.

Discharge of Incumbrances on Sale.

Provision by Court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason think fit to require a larger additional amount.

This s. is confined to cases of sales only.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from

the incumbrance, and make any order for conveyance, or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

Discharge of Incumbrances on Sale.

See *Dickin* v. *Dickin*, W. N. 1882, 113; *Milford, &c., Co.* v. *Mowatt*, 28 Ch. D. 402.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

How application to Court made.

See definition of incumbrance, s. 2 (vii). Under s. 69, subs. (3) the application to the Court will be by summons; subss. (4), (5), and (6) provide for the notices to be given; subs. (7) provides for costs.

Facilities given for sale of encumbered estates.

This s. greatly facilitates sales of encumbered estates, especially when taken in connection with ss. 15, 16, and 25. It applies to ordinary sales, as well as sales by the Court. Suppose the estate to be subject to a jointure or portions for younger children under age, and therefore not yet raisable, the owner could not sell free from the jointure unless the jointress consented to release, and must necessarily sell without any release of the portions and subject to depreciatory conditions as to indemnity, or leave them a charge to be allowed out of the purchase-money.

Under this s. and ss. 15, 16, and 25, the course will be simple. In the case of a sale by the Court the proper amount can be set aside out of the purchase-money when paid in. In the case of a sale out of Court, the owner can, when the contracts are signed, and on the faith of the incoming purchase-money, generally procure a temporary advance of the amount required to be paid into Court to answer the charges, and thus at once obtain a conveyance or vesting order (s. 5, subs. 2). By s. 69, subs. 7, the Court can direct by whom the costs of any application are to be paid.

Costs of application.

What incumbrances included.

A capital sum or an annuity payable out of rents and profits or a capital sum charged on a reversionary interest are within this s. (see s. 2 (vii.)). An annual sum, whether terminable or otherwise, charged on land, and a capital sum charged on a determinable interest in land, constitute the two cases where a capital sum could not be or might not properly be applied out of the proceeds of sale in discharge of the incumbrance. In the one case the annuitant is entitled to have payment of the annual sum continued to him, in the other case, capital money

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SALES AND OTHER TRANSACTIONS.

Discharge of Incumbrances on Sale.

should not be applied in payment of the charge to the prejudice of the remainderman. Therefore this s. provides for the application of dividends only in payment.

It seems that a vendor will not be compelled to make use of this s. for discharging an incumbrance—at least where it would inflict hardship on him: *Re Great Northern R. Co. and Sanderson*, 25 Ch. D. 788, where the learned judge seemed to think that the s. does not apply to a rent-charge created under the provisions of an Act of Parliament, *sed qu.*

Vendor not compelled to act on this s.

It is conceived that any surplus income after paying the annual sum for keeping down interest on the principal sum should be paid to the vendor and not accumulated as an addition to the fund.

General Words.

General Words.

General words in conveyances of land, buildings, or manor.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

Light.

This subs. does not operate as a grant *de novo* of a right of light: *Beddington* v. *Atlee*, 35 Ch. D. 317.

(3.) A conveyance of a manor shall be deemed to

include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein conveyed.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

Use of general words as to land or houses.

The object of inserting general words in a conveyance was to prevent any question as to whether a particular easement or right would, or would not pass without those words. In most cases the words might be useless; still in some case they might be required, as for instance, to pass reputed rights and easements. As a general rule in case of land and houses they merely express what is included in the description, or form part and parcel of the land or houses, and the rights and easements appurtenant thereto, *i.e.*, annexed by express or implied grant, and all these pass with the land or houses (Gale, 48; 63, 6th ed.; Williams Real. P. 328, 12th ed.). But where an easement has become

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SALES AND OTHER TRANSACTIONS.

General Words.

Easements used or enjoyed with but not appurtenant to land.

extinct by unity of possession of the dominant and servient tenements, a conveyance of land or a house "with all easements therewith used and enjoyed," will operate as a grant *de novo* of the easement which, though at one time appurtenant, had been extinguished (*Barlow* v. *Rhodes*, 1 Cr. & M. 448; Gale, 48; 67, 6th ed.; Wms. Real. P. 329, 12th ed.). Even where no easement existed before the unity of possession, but a right of way was used with one tenement over the other, a grant of the first-mentioned tenement, "together with all ways now *used* or *enjoyed therewith*," would pass the right of way (*Barkshire* v. *Grubb*, 18 Ch. D. 616; see also *Watts* v. *Kelson*, L. R. 6 Ch. Ap. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360); but would not pass it if the grant were only "with all ways appurtenant thereto" (*Harding* v. *Wilson*, 2 B. & C. 96; *Bolton* v. *Bolton*, 11 Ch. D. 970, 972: and see *Brown* v. *Alabaster*, 37 Ch. D. 490; *Thomas* v. *Owen*, 20 Q. B. D. 225). A conveyance after 1881 will similarly operate to pass reputed easements under this Act, without any express general words.

General words as to manors.

The general words used in a conveyance of a manor either (1) express what is included in the description as parcel of the manor (see Shep. Touch. 92), or (2) they are royal franchises, which if they are appurtenant to the manor pass without express words, but not otherwise (see *Morris* v. *Dimes*, 1 Ad. & El. 654).

Mines and minerals.

Mines and minerals pass under a conveyance of land without being expressly mentioned, except in copyhold or customary assurances and except in conveyances to railway companies, from which latter they are excepted unless expressly mentioned (see 8 & 9 Vict. c. 20, s. 77). They are therefore omitted from the general words which by this section are made applicable to land and houses, but are included in the general words applicable to manors, as they may in some cases have become severed from the manor, and once severed could not be reunited to it as they might be to the surface of land when both become vested in the same owner. It may be a question whether an enfranchisement of copyholds by conveyance of the fee simple reserving the minerals would not operate as a severance.

Covenants for Title.

Covenants for Title.

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the convey-

ance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

This clause should be read in connection with s. 64, making singular include plural and plural singular in implied covenants. Sect. 59, subs. 2, and subs. 6 of this section render it unnecessary to provide expressly that the covenant shall be by the conveying party "for himself, his heirs, executors, or administrators," or that it shall be with the "heirs and assigns" of the party to whom the conveyance is made. As regards acts to be done under the covenant, when made with two or more, this s. should be read with s. 60, subs. 2.

Covenant need not be expressed to be for heirs, &c.

Therefore when "A. and B. as beneficial owners hereby convey," it is implied that "A. and B." (plural, s. 64) "hereby for themselves, their heirs," &c. (s. 59 (1) (2)) "covenant," that is, they give a joint covenant. When "each of them A. and B. as beneficial owner hereby conveys," it is implied that "each of them hereby for himself, his heirs," &c. (s. 59 (1) (2)) "covenants," that is, each gives a several covenant. Where they convey in both modes they give joint and several covenants. Again in the covenant for further assurance the words "at the request and cost of the person," &c., where the conveyance is to several, include "persons" (s. 64) and the survivors or survivor of them, and the person on whom the right to sue on the covenant devolves (s. 60 (1) (2)).

Joint and several covenants, how implied.

The covenant of a conveying party is implied "as regards the subject-matter or share of subject-matter *expressed* to be conveyed by him." It is not material that he actually has anything to convey, he may be made in terms to convey simply for the purpose of giving an implied covenant. Therefore, in the case of a conveyance by tenant for life and remainderman if they both convey as beneficial owners a covenant will be implied by both as to the whole fee, joint or several or both, according to the mode in which they convey.

Covenant applies to subject *expressed* to be conveyed.

So also in a conveyance by tenant for life, and remainderman for life, or in tail or in fee, or by joint tenants, or tenants in common, there can be implied covenants joint or several or both, as to the entirety or part, as may be required.

By tenant for life and remainderman.

The covenants in this s. are applicable to property of all kinds, including policies of assurance, reversionary interests in personal estate, choses in action, and personal chattels: see the definition of conveyances, s. 2 (v).

Covenants applicable to all property.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On conveyance for value, by beneficial owner.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title,

Right to convey.

S. 7 (A).

SALES AND OTHER TRANSACTIONS.

Covenants for Title.

otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and

Quiet enjoyment.

Freedom from incumbrance.

Further assurance.

every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

How conveying party to be described.

The meaning of Clause (A) is that the actual words of conveyance must describe the conveying party as "beneficial owner," or "settlor," or otherwise (as intended): (see the 4th Sch. to the Act, Forms I., III., and IV.). It is not sufficient to recite that he is seised in fee, and then for him to convey simply. He must be expressed to convey as "beneficial owner," "settlor," or otherwise as the case may require.

Word "convey" not necessary.

It is not necessary, in order that a conveyance may operate under this s., to use the word "convey" or "conveyance." These words include all the operative words "assign," &c., ordinarily used, see s. 2 (v.), and may be used instead of the word "grant," see s. 49 and the schedules to this Act where "convey" is used to pass a fee simple, and s. 57 which enacts that deeds using expressions to the like effect as in the 4th schedule shall be sufficient. Accordingly it is immaterial what word is used; in a conveyance in fee "grant" may be used; in a conveyance under a power "appoint" may be used; and in the case of personal estate "assign" may be used, all these words being equally capable of attracting the covenants in this section.

Any operative word sufficient.

"Purchase for value."

The expression "purchase for value" is not to include a conveyance

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in consideration of marriage for the reason that the covenant E, *infra*, by a settlor is a limited covenant. Therefore a person deriving title under a marriage settlement should covenant as to the acts of the settlor in the same manner as he would covenant for the acts of his ancestor if he were conveying as heir at law.

Covenants in voluntary conveyance.

A voluntary conveyance (if it be not a settlement to which covenant E is made applicable) still requires an express covenant, if any is intended to be given, but in most cases no covenant would be given.

How far back covenant extends.

If A. takes by conveyance on a sale by B., who takes under a settlement, voluntary or otherwise, made by C., then B. derives title "otherwise than by purchase for value" through C., and in the conveyance by B. to A. the implied covenant by B. would extend to the acts of C. But A. does not derive title "otherwise than by purchase for value" through B. and consequently not through C., and on a conveyance by A. his implied covenant would extend only to his own acts. This appears clear if we consider that, assuming the settlement voluntary, C. could defeat it by conveyance for value before A.'s purchase but not afterwards. The implied covenant therefore extends back only to acts subsequent to the last conveyance for value not being a settlement.

Covenant (A) does not apply to money due for paving expenses, which is recoverable from the owner personally, but is not a charge upon the land: *Egg* v. *Blayney*, 21 Q. B. D. 107.

On conveyance of leaseholds for value, by beneficial owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be

deemed to include a conveyance in consideration of marriage):

The Act does not provide for the covenant of indemnity against rent and covenants by a purchaser on the assignment of leaseholds. The circumstances differ so much that a general covenant could not easily be framed. Moreover the purchaser does not always execute the deed.

On assignment of leaseholds express covenant by purchaser still required.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage by beneficial owner.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming

Right to convey.

Quiet enjoyment.

Freedom from incumbrance.

Further assurance.

S. 7 (C), (D).

SALES AND OTHER TRANSACTIONS.

Covenants for Title.

any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will, from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Bill of Sale.

Covenant (C) inserted in a Bill of Sale makes it void: *Ex parte Stanford*, 17 Q. B. D. 259.

On mortgage of leaseholds by beneficial owner.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times,

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as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

Payment of rent and performance of covenants.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

On settlement.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

For further assurance, limited.

Covenants in settlements, old practice as to.

The old practice in settlements was for the settlor to give the ordinary vendor's covenants for title. This can still be done by making him convey as beneficial owner instead of as settlor, and so incorporating covenant (A). The old practice is inconvenient. If a charge be suppressed or accidentally overlooked, the trustees on discovering it become bound to sue the settlor. The amount to be recovered might be such as to leave him penniless and make proceedings in bankruptcy necessary.

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SALES AND OTHER TRANSACTIONS.

Covenants for Title.

This cannot be for the benefit of the wife or family, and is an obligation which should not be imposed on trustees. There should be either no covenant for title, or at most this limited covenant (E), which binds the settlor, purporting to convey the fee simple, to bar an estate tail (see *Davis* v. *Tollemache*, 2 Jur. N. S. 1181, 1185), or execute a valid appointment under a power, or do any other like act for confirming the settlement, but does not throw on him any obligation to discharge incumbrances.

On conveyance by trustee or mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

Covenant by outgoing trustee not material.

On a change of trustees the covenant against incumbrances of an outgoing trustee is now of little importance, any wrongful incumbrance is a breach of trust for which there is a remedy independently of the covenant. Before the Act 32 & 33 Vict. c. 46, the covenant was useful as making the breach of trust a speciality debt having a priority.

On conveyance by direction of beneficial owner.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

Under subs. 1 the covenant implied on the part of any person conveying relates to what he himself conveys. Under this subs. the covenant implied on the part of the person directing applies to what another conveys by his direction. The same result would be attained by making him convey by way of confirmation as beneficial owner.

Old practice as to covenants by tenant for life.

This subs. is intended to apply to a case like that of a sale by trustees under a power by the direction of the tenant for life. Since the S. L. A., 1882, the tenant for life will generally be himself the vendor. The old practice was to make the tenant for life covenant generally as if he were a vendor seised in fee. Latterly the practice has been to confine his covenant to his life estate only (see Dart, V. & P. 620, 6th ed.; 2 Dav. Conv. 261 (*o*), 4th ed.), and a proviso so limiting the covenant and operating under subs. 7 of this s. should be added.

Implied covenants in conveyance by husband and wife.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

The object of this subs. is to enable covenants on the part of the husband to be incorporated where husband and wife convey.

The wife may convey with consent of the husband, the husband not conveying. Then the covenant is by the wife only, to the effect that notwithstanding anything done by her, &c., or any one through whom she derives title otherwise than, &c. But the general practice is for the wife to convey, and the husband also to convey and to confirm. In that case the wife and the husband should each be expressed to convey as beneficial owner, then within this subs. she will be deemed to convey by the direction of her husband as beneficial owner, and the three following covenants will be implied: (1) by the wife as beneficial owner binding her present separate property, which she is not restrained from anticipating, if the conveyance is made before 1883 (see *Tullett* v. *Armstrong*, 4 Beav. 323 per M.R.; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454), and binding her present and future separate property, which she is not restrained from anticipating, if the conveyance is made after 1882 (see M. W. P. A., s. 1 (3) (4), s. 19); (2) by the husband as beneficial owner; and (3) by the husband in the same terms as the covenant implied on the part of the wife, that is in effect,

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Covenants for Title.

that notwithstanding anything done by her or by any one through whom she derives title otherwise than, &c.

Where a married woman conveys under a power she and her husband may in like manner each be expressed to convey as beneficial owner, then the three covenants above mentioned will be implied. The second of those covenants (being the first of the husband's covenants) will not be of importance, but his second covenant corresponds with the usual one entered into by him in similar cases independently of this Act.

A married woman conveying under a power

Where the wife, married before 1883, conveys as beneficial owner property acquired by her after 1882, the concurrence of her husband is no longer necessary, as he takes no interest, and she disposes of it as a *feme sole:* M. W. P. A., s. 5; nor for the same reason is it necessary as to any property of a woman married after 1882, *ib.* s. 2.

As to wife's property acquired after 1882.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

A conveyance can still be drawn in the old form. The character in which the conveying party conveys should then not be stated, and covenants can be inserted in express words.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

Covenant to surrender may incorporate covenant.

By s. 2 (v.) "conveyance" includes a covenant to surrender. The statutory covenants contained in this s. may therefore be incorporated in the deed of covenant, but they cannot be incorporated in the surrender unless it is under seal. They may also be incorporated in all cases where customary or copyhold lands can be dealt with as freeholds, for instance, where they pass by bargain and sale under a power in a will, or by deed and admittance by virtue of the S. L. A., 1882, or otherwise, or where an equity is conveyed.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be

capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

Benefit of implied covenants in this section to run with the land.

This subs. makes all covenants implied under this s. run with the land so as to be enforceable by every person interested under the conveyance. It precludes any difficulty as to what covenants do or do not run with the land, as to which see note to s. 58. An implied covenant under this s. will therefore be more valuable than the ordinary covenant.

See further as to covenants, ss. 58–60 and 64.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

Variation of statutory covenants may be made.

This subs. enables provisions to be inserted modifying the statutory covenant in any agreed manner. As so modified it will be equivalent in effect for the purpose of running with the land and otherwise, to the simple statutory covenant. A proviso now generally used limiting the covenants for title by a tenant for life is an example of a variation under subs. 7, and is a valid proviso and not repugnant to the covenant (see *Williams* v. *Hathaway*, 6 Ch. D. 544).

(8.) This section applies only to conveyances made after the commencement of this Act.

Execution of Purchase Deed.

Execution of Purchase Deed.

Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this Act.

The s. precludes the questions raised in *Viney* v. *Chaplin*, 4 Drew. 237, 2 D. & J. 468; *Essex* v. *Daniel*, L. R. 10 C. P. 538; and *Ex parte Swinbanks*, 11 Ch. D. 525. See notes to s. 56.

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SALES AND OTHER TRANSACTIONS.

Production and Safe Custody of Title Deeds.

Acknowledgment of right to production, and undertaking for safe custody of documents.

Production and Safe Custody of Title Deeds.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commis-

sion, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6). An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

Legal right to production assimilated to the equitable right.

This s. removes certain difficulties as to covenants for production running with the land, and makes the legal right to production co-extensive with the equitable right (as to which, see *Fain* v. *Ayers*, 2 Sim. & St. 533, Dart, ch. ix., s. 2, 6th ed.). Also it removes the personal liability of the original covenantor after he has parted with the documents, and transfers that obligation to each subsequent possessor, but for the period only of his possession. This personal liability has sometimes compelled a covenantor to retain documents after he had ceased to be interested in any land affected by them, or else to incur the expense of obtaining, and of procuring the covenantee to accept, a substituted covenant. A person retaining documents is now enabled to give (1) an acknowledgment of the right of production, and (2), an undertaking for safe custody, together or separately. The first, unlike a covenant to the same effect, may safely be given by a trustee or mortgagee. He can always produce the documents while he has possession of them, and he ceases to be liable after he has parted with them. He should only give the acknowledgment and not the undertaking (see n. to subs. 14). An ordinary vendor will be liable to give both in the absence of special contract. As to the right of the vendor to retain documents, see V. & P. A., s. 2, r. 5.

Effect of s. 9.

No liability to damages where acknowledgment only given.

Subs. 6 expressly excludes all liability to damages for loss or destruction where an acknowledgment only is given. The liability for damages arises only upon an undertaking under subs. 9.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an

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Production and Safe Custody of Title Deeds.

order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

Acknowledgment substituted for covenant to produce.

Where by general law, and in the absence of special contract, a person would be bound to give a covenant for production and delivery of copies, subs. 8 enables him to give an acknowledgment in place of the covenant, but does not compel him to do so. He still has the option of giving a covenant, an option not likely to be exercised, as the covenant creates a more onerous liability. This s. applies only to liabilities respecting documents incurred after 1881: see subs. 14.

Where conveyance made to uses.

Where a conveyance is made to uses the acknowledgment should, like the old covenant for production, be made to the grantee to uses. The persons interested under the limitations will then, as "claiming any estate, &c., through" that grantee (see subs. 3) be entitled to the benefit of the acknowledgment.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

Liability under undertaking is on possessor only.

This subs., as compared with the ordinary covenant for production, operates as a relief to the person bound to produce. It makes him liable for damages only while the documents are in his possession. On the other hand, it imposes an additional liability on any person afterwards acquiring possession of the documents, making him liable in damages for loss or destruction, a liability not necessarily devolving

on him under the ordinary covenant merely by reason of his receiving the documents from a person who had covenanted for safe custody. As to the question of damages, see *Hornby* v. *Matcham*, 16 Sim. 325, and *Brown* v. *Sewell*, 11 Hare, 49. In *James* v. *Rumsey* (11 Ch. D. 398) the mortgagor was held entitled to an indemnity, but not to compensation.

Damages for loss of deeds.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

Application under acknowledgment or for damages, how made.

An application to the Court under this subs. or under subs. 7 should be by summons: see s. 69 (3).

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

See note to subs. 8.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

Whether trustees should give undertaking.

The covenant for production of documents intended to be superseded by this s. imposed two obligations, (1) an obligation to produce, (2) an obligation to keep safe. The first could be enforced by specific performance, but the remedy on the second was damages only. The

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old practice was that a trustee selling did not give any covenant. Latterly it has been customary for him to give a covenant limited so as to bind himself personally while having possession of the documents, and so as to bind the same, so far as may be, in the hands of other persons, "but so as not to create any further liability," or "so as not to create any liability for damages." With this limitation inserted it is conceived that the part of the covenant as to safe keeping should have been omitted, the limitation of liability being repugnant and void (*Williams* v. *Hathaway*, 6 Ch. D. 544); but this does not seem always to have been attended to in the precedent books. However this may be, the general rule is that a trustee does not covenant except for his own acts, and ought not to be asked to guarantee the safety of documents which might be lost without his personal neglect, as for instance, by his solicitor on a journey, when properly removing them. In this view trustees ought only to give an acknowledgment under this section and not an undertaking. If they give an undertaking any damages incurred could not, it is apprehended, in the absence of special provision, be recouped to them out of the part of the trust estate retained. But on purchase of an estate with deeds bound by an undertaking, the liability would be one attached by law to the estate, and in a proper case the trustees would be entitled to be recouped any loss. The same principle applies to mortgagees.

Acknowledgment or undertaking may be included in the conveyance.

The old practice was to take the covenant for production of documents by a separate deed, and not to include it in the conveyance. On subsequent dealings it was kept off the abstract, and no opportunity was given for making requisitions as to the documents mentioned in the covenant. Having regard to the Act, 22 & 23 Vict. c. 35, s. 24, it is conceived that a solicitor cannot now safely omit giving an abstract of a document of even date with the conveyance commencing a title.

Under the C. A., s. 3 (3), when a conveyance becomes a root of title any requisition as to prior documents is precluded, and there is therefore no special reason for giving an undertaking by a separate writing unless the schedule of documents would make the conveyance inconveniently long, but it seems best so to give it, and if so given it can be destroyed when production has ceased to be of importance.

Stamp on an acknowledgment or undertaking.

A separate writing, under hand only, should bear a sixpenny agreement stamp. Though not a document clearly included in the Stamp Act, it might be held to be in effect an agreement.

Expense, by whom to be borne.

An acknowledgment and undertaking being substituted for a covenant the expense will be borne by the person who would pay for the covenant, but, besides the stamp, the expense will in any case be no more than the mere cost of making out a schedule of documents.

No indemnity required on delivery over.

The liability of a person giving an acknowledgment or undertaking ceases when the documents are delivered over, and attaches to the person receiving them. Therefore no indemnity need be taken on delivery over, but it is conceived that they must be properly delivered over, that is to say, to a person having an interest in the property to which they relate.

The acknowledgment or undertaking must be given by a person who retains the documents, *i.e.*, who actually has possession of them. Therefore where, as sometimes happens on a sale of property in mortgage, the mortgagor and mortgagee are required to place themselves under an obligation for production, the obligation by the mortgagee being limited to the period during which he has possession, he alone can give an acknowledgment. The mortgagor does not retain the deeds, and his obligation is, not to produce, but to procure production, and, if required, must be provided for by covenant in the old form. It is wrong to make the mortgagor in such a case give an undertaking for safe custody. His undertaking has no operation under this Act. It operates as an unqualified ordinary contract for safe custody, and renders him liable for loss or destruction of the deeds after he has ceased to have any interest in them, and the person to whom it is given has not the benefit of subs. (10) of this s.

Section only applies to persons actually having possession of documents.

Under s. 16, *infra*, a mortgagee, under a mortgage made after 1881, is bound to produce the deeds in his custody or power to any person entitled to redeem, and to permit him to take copies or abstracts.

Production by Mortgagee.

III.—LEASES.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased.

Rent and benefit of lessee's covenants to run with reversion.

(2.) This section applies only to leases made after the commencement of this Act.

This s. gives to the "person entitled to the income," that is, the beneficial owner, as well as the legal reversioner, the right to sue. It also gives a mortgagee the right to sue on the lessee's covenants in a lease made under s. 18 of this Act by the mortgagor: *Municipal, &c., Building Soc.* v. *Smith*, 22 Q. B. D. 70.

Beneficial owner as well as legal reversioner entitled to sue.

As to some of the difficulties provided against by this s. see *Greenaway* v. *Hart*, 14 Com. B. 340; *Yellowly* v. *Gower*, 11 Exch. 274.

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As to the cases in which the benefit of covenants by lessees ran with the reversion prior to this Act, see *Spencer's Case*, and notes, 1 Smith, L. C. 65, 72, *et seq.*, 9th ed.

Obligation of lessor's covenants to run with reversion

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

Lessor's covenants in leases under powers.

This s. makes legally binding on the successors in title of a person who grants a lease under a power, all covenants which, as against the remainderman, the grantor has power to enter into.

As to the cases in which the obligation of covenants by lessors ran with the reversion before this Act, see *Spencer's Case*, and notes *ubi sup.* As to the obligation of covenants running with the land, generally, see note to s. 58.

This s. necessarily does not apply to cases where the covenants are not severable in their nature, or are not attributable to particular parts of the demised property.

Principle of 32 Hen. 8. c. 34, extended to leases binding the legal reversioner.

The two preceding sections effect a considerable extension of the principle of the Act 32 Hen. 8, c. 34, whereby the benefit of a covenant was annexed to the reversion. In order to be within that Act, the covenant must have been entered into with the owner of the legal reversion, so that in a lease under a power reserved to the mortgagor by the mortgage deed a covenant by the lessee with the mortgagor did not run, but was a covenant in gross, the mortgagor not being the legal reversioner. But the Act 8 & 9 Vict. c. 106, s. 5, enabled the lessee to covenant with the mortgagee though not a party to the lease, so that a covenant properly framed, that is with the mortgagor "and other the person entitled to the reversion," would after that Act run with the legal reversion. Now under s. 10 of this Act, wherever there is a legal reversion, that is, where a lease is made by means of an ordinary power

or a statutory power as under s. 18 of this Act, or under the S. L. A., 1882, enabling a legal term to be carved out of the reversion, the lessee's covenants, whether so expressed or not, are annexed to and run with the reversion, and are no longer covenants in gross.

So under s. 11 the covenants of a lessor who has power to bind the reversionary estate, will run with and bind the reversioner, though the lessor be tenant for life only, or, as mortgagor, be entitled only to an equitable interest.

Where a mortgagor, not having power to bind the mortgagee, grants a lease, no legal term is created, and there being consequently no reversion, ss. 11 and 12 do not apply. If, however, the mortgagee reconvey to the mortgagor, the lease becomes good by estoppel; and if both convey to a purchaser, the result is the same: *Cuthbertson* v. *Irving*, 6 H. & N. 135.

Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

Application of this s.

The 22 & 23 Vict. c. 35, s. 3, provides for the apportionment of conditions of re-entry where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned. This s. of the present Act provides for the apportionment of every condition in a lease, which is in its nature apportionable, and includes the case of the avoidance or cesser in any manner of the term granted by the lease as to part only of the land comprised therein.

On sub-demise title to leasehold reversion

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a

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not to be required.

leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

What title to be shewn by leaseholder selling or leasing.

This s. is supplementary to s. 3 (1), and to the V. & P. A., s. 2, r. 1.

The effect of this s., together with s. 2, r. 1, of the V. & P. A., on a contract to grant a lease, is as follows :—

By the V. & P. A., under a contract to grant a lease for a *term of years*, the intending lessee—

(1) Cannot, whether the intending lessor be freeholder or leaseholder, call for the title to the freehold,

(2) But can, if the intending lessor be a leaseholder, call for his lease and the title thereto.

By the above s. 13 the intending lessee

(3) Cannot, where the intending lessor holds by under-lease, call for the title of the superior leasehold reversion on such under-lease.

In contradistinction to a freeholder, the leaseholder is still left under liability to shew his own lease and the title thereto. This is in accordance with the usual practice. The freeholder almost invariably bars himself from shewing his own title on granting a lease, but a leaseholder does not generally do so.

Forfeiture.

Forfeiture.

Restrictions on and relief against forfeiture of leases.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action, or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

As to service of notice, see s. 67.

It seems not necessary that the notice should give a minute specification of the items of breach. It should merely point out generally what is the breach. Thus, in case of a covenant to "repair, maintain," &c., it would be sufficient to state that the lessee has "not repaired, maintained," &c., following the words of the covenant. But the notice should give sufficient details where necessary in order that the matter in dispute may be remedied without resort to the Court: Woodfall, L. & T. 330, 13th ed. Contents of notice.

An assignee of a lease is entitled to the benefit of this s. (*Cronin* v. *Rogers*, 1 Cab. & Ell. 348), also the under-lessee of one of two houses comprised in one superior lease where there is a breach of covenant by the lessee of the other house (*Cresswell* v. *Davidson*, W. N. 1887, 87), but this s. does not apply to an agreement for a lease where there is no present title to specific performance: *Swain* v. *Ayres*, 20 Q. B. D. 585, 21 *ib.* 289. Assignee of lease. Agreement for a lease.

A notice under this s. is sufficiently served on an assignee if addressed to the original lessee and all others whom it may concern and served on the occupier: *Cronin* v. *Rogers*, 1 Cab. & Ell. 348. Service of notice.

In *North London Land Co.* v. *Jacques*, 32 W. R. 283, W. N. 1883, 187, the lessor's notice was informal in not requiring the lessee to remedy the breach, and though judgment had been actually recovered in an undefended action against the equitable mortgagees of the lessee, they were held entitled to relief. Informal notice.

The compensation claimed is measured by the breach, only where the breach cannot be remedied. The compensation will in most cases be merely the amount of expenses incurred. No separate remedy is given for recovering the compensation claimed, so that though the breach is remedied, the action of ejectment must proceed in order to compel payment, and care should be taken not to receive rent in the meantime. Amount and recovery of compensation.

A landlord giving notice to repair under a covenant to repair cannot recover his surveyor's charges, as there is no contract to pay resulting damage: *Logan* v. *Hall*, 4 C. B. 625; and if the notice is complied with there is no breach of covenant. It is conceived that the same principle does not apply to notice under this s. Until damages are paid the notice is not complied with. Surveyor's charges.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses,

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damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

Relief.

The tenant can only obtain relief under this s. before the landlord has re-entered: *Quilter* v. *Mapleson*, 9 Q. B. D. 675, 676. Relief was refused in *Ebbets* v. *Booth*, Sol. J. 1883, 618, and *Scott* v. *Brown*, W. N. 1884, 209. It was granted upon terms in *North London Land Co.* v. *Jacques*, 32 W. R. 283, W. N., 1883, 187, in *Bond* v. *Freke*, W. N. 1884, 47, and *Mitchison* v. *Thomson*, 1 Cab. & Ell. 72.

What relief before this Act.

Before this Act no relief could have been obtained against the right of re-entry for breach of covenant in a lease, except in the case of a covenant for payment of rent (*Hill* v. *Barclay*, 18 Ves. 56; *Bracebridge* v. *Buckley*, 2 Price, 200; *Nokes* v. *Gibbon*, 3 Drew. 681); or except in cases of accident or surprise (*Hill* v. *Barclay*, 18 Ves. 62); or under special circumstances enabling a Court of Equity to grant relief (*Bamford* v. *Creasy*, 3 Giff. 675; *Bargent* v. *Thomson*, 4 Giff. 473; *Hughes* v. *Metrop. R. C.*, 2 App. Cas. 439). Under 22 & 23 Vict. c. 35, ss. 4–9, Courts of Equity had power to grant relief in certain cases of forfeiture for omission to insure against fire. That power was extended to Courts of Common Law by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 2. These enactments are repealed by this Act (see subs. (7) of this section); but by subs. (8) the relief against forfeiture for non-payment of rent, which extends to an under-lessee (*Doe* v. *Byron*, 1 Com. B. 623), is left untouched. As to this relief at common law, see the C. L. P. Act, 1852, 15 & 16 Vict. c. 76, s. 212, and the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 1.

How damages are to be ascertained.

The Act gives no guide for estimating the penalty to be imposed on the lessee. Where there has been a breach of a covenant to insure, but no loss, it is difficult to say what sum should be paid to the landlord. The probability is that the only penalty will be costs: see *Quilter* v. *Mapleson*, 9 Q. B. D. 678.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies, although the proviso or

stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy (*a*) of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease (*b*), to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

(7.) The enactments described in Part I. of the second Schedule to this Act are hereby repealed.

Protection of purchaser of leaseholds against forfeiture for non-insurance.

The repeal by this subs. of s. 8 of 22 & 23 Vict. c. 35, does away with the special relief given in respect of insurance to a purchaser of a leasehold, and places him in the same position as his vendor in respect to relief generally against forfeiture. The Court would scarcely enforce a forfeiture against a purchaser without notice, or award damages or enforce a penalty against him, and he thus appears practically in as good a position in respect to insurance as under the repealed sect. The case of *Ex parte Gorely*, 4 De G. J. & S. 477, rendered s. 7 of the same Act no longer necessary.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

Forfeiture, &c., for non-payment of rent.

As to forfeiture and relief against forfeiture for non-payment of rent, see Woodfall L. & T. 331, 13th ed.

(*a*) *Ex parte Gould, Re Walker*, 13 Q. B. D. 454. As to the meaning of "bankruptcy," see s. 2 (xv.).

(*b*) As to the meaning of "mining lease," see s. 2 (xi.).

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(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

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IV.—MORTGAGES.

Powers of mortgagor conferred by this Act.

The following is a summary of the powers conferred on mortgagors and mortgagees by this Act and made incident to their estates, unless a contrary intention is expressed, except as to the first two powers, (i.) and (ii.), which apply notwithstanding any stipulation to the contrary.

A mortgagor

(i.) May require the mortgagee, not being or not having been in possession, to transfer instead of reconveying, and to assign the debt: C. A., s. 15;

(ii.) May inspect and take copies of title deeds: s. 16;

(iii.) May redeem one mortgage without redeeming any other: s. 17;

Mortgagor in possession.

(iv.) May have an order for sale in a redemption action: s. 25;

(v.) May when in possession make or agree to make agricultural or occupation leases not exceeding twenty-one years, and building leases not exceeding ninety-nine years: s. 18 (1), (17).

(i.) and (iv.) are retrospective, (ii.) is not; (iii.) applies where the mortgages, or one of them, are or is made after 1881; (v.) is not retrospective, except by agreement.

Powers of mortgagee.

A mortgagee under a *deed* made after 1881

(vi.) May when the mortgage money has become due sell or concur in selling: ss. 19 (i.), 20, 21;

(vii.) May insure: ss. 19 (ii.), 23;

(viii.) May appoint and remove a receiver: ss. 19 (iii.), 24;

(ix.) May give receipts for purchase and other moneys and securities: s. 22;

(x.) May after his power of sale has become exercisable recover the title deeds, except against persons having prior claims: s. 21 (7);

Mortgagee in possession.

(xi.) May when in possession exercise the like powers of leasing or agreeing to lease as a mortgagor in possession: see (v.) *supra*; s. 18 (2), (17);

(xii.) May cut and sell timber: s. 19 (iv.);

(xiii.) A mortgagee, whether the mortgage is before or after 1881, may obtain an order for sale in an action for foreclosure or redemption: s. 25 (2).

Of the above (xiii.) is retrospective, (vi.) to (x.), and (xii.) are not; (xi.) is not retrospective except by agreement.

A second or subsequent mortgagee, as being a person entitled to redeem (see s. 2 (vi.)).

(xiv.) May also exercise powers (i.) to (iv.).

(xv.) On the death of a sole mortgagee dying after 1881 the estate (except copyhold or customary land to which he has been admitted) devolves on his personal representatives, notwithstanding any devise in his will: s. 30.

Devolution of mortgage estates on death.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

Obligation on mortgagee to transfer instead of re-conveying.

This s. includes an equitable as well as a legal mortgage. Though a second mortgage, or any other equitable charge, is discharged by mere payment by the owner of the equity of redemption, and no re-conveyance is necessary, yet it is not so discharged if paid by another person, and if so paid, a transfer can be required under this s. of an equitable charge as well as of a legal mortgage.

When transfer of an equitable charge necessary.

A tenant for life who has obtained an order to redeem on terms which prevent interest and further costs running up against the remainderman, will be held to those terms, and cannot under this s. require transfer to a third person: *Alderson* v. *Elgey*, 26 Ch. D. 567.

Redemption by tenant for life.

In *Teevan* v. *Smith*, 20 Ch. D. 724 (as to which see *Marson* v. *Cox*, 14 Ch. D. 140), the actual decision was that the mortgagor could not require a transfer to his nominee as against the second mortgagee who desired to redeem the first. But the Court seemed to think that this s. did not in any case enable a mortgagor to require a first mortgagee to transfer where there were intermediate mortgagees, even though they did not ask to redeem. This construction would have rendered the s. to a great extent nugatory. The main difficulty arises where there are successive mortgages and the first mortgagee insists on foreclosing or selling unless paid, but refuses to transfer and will only reconvey to the second mortgagee. No advance can then be obtained to pay off the first mortgage, except on terms of paying all. This is now provided for by s. 12 of C. A., 1882, which enacts that

Amendment of this s.

C. A., 1882, s. 12. Reconveyance on mortgage.

The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a

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requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

C. A., s. 15, *continued.*

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

Why mortgagee in possession excepted.

The reason for excepting a mortgagee in possession (see Coote, Mortg. 720, 5th ed.) is, that once having taken possession he remains liable for all that he might but for his wilful default have received, and also liable in respect of working minerals and other matters, and remains liable after transfer for the acts and defaults of the transferee. Though the request of the mortgagor to transfer might operate as a release by him, the liability to mesne incumbrancers would still continue. A second or subsequent mortgagee might go into possession and be ousted by a prior mortgagee. Therefore it is necessary to exclude a mortgagee who has been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Mortgagor includes second mortgagee.

In applying this and the two following sections it must be remembered that mortgagor includes any person deriving title under the original mortgagor or entitled to redeem: s. 2 (vi.); *Teevan* v. *Smith*, 20 Ch. D. 724, 730.

Decisions cancelled.

The decisions cancelled by this s. are *Dunstan* v. *Patterson*, 2 Ph. 345, and others referred to in Fisher, Mortg. 962 (*c*) 4th ed.; and Coote, Mortg. 802 (*g*) 5th ed.

How rights under this s. enforced.

The mode of enforcing the right given by this s. will be (1) by an action to redeem, in which the mortgagee will be directed to transfer instead of re-conveying, and on refusal there will be the same remedy as on refusal to re-convey; (2) in case of a sale, by payment of the amount of the incumbrance into Court under s. 5, when on refusal to transfer a vesting order can be made under that s. This s. is retrospective.

Retrospective.

First mortgagee must not prejudice second mortgagee.

Though a first mortgagee may transfer he must not join in conveying, so as to defeat a second mortgage of which he has notice, otherwise he will be liable to the second mortgagee to the extent of the balance of the purchase-money: *West London Commercial B.* v. *Reliance Build. Soc.*, 27 Ch. D. 187, 29 *ib.* 954.

Power for mortgagor to inspect title deeds.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title

relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

See first n. to s. 15 (3).

Restriction on consolidation of mortgages.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Cases affected.

As to the decisions affected by this s., see Coote, Mortg. ch. 67, 5th ed.

Equity of redemption altered.

The words "seeking to redeem" are general, and apply to the case of a mortgagor or subsequent incumbrancer giving notice to pay off as well as to the case of a redemption suit, or of a payment under an order in a foreclosure suit. Thus in the absence of agreement to the contrary, an equity of redemption arises in the mortgagor free from the right to consolidate. He is put in the same position as if he were another mortgagor, consequently the surplus proceeds of a sale (s. 21 (3)) under one security cannot be applied to make good the deficiency of another security.

How consolidation may still arise.

Under this s. consolidation of mortgages can only arise by express contract. It does not in terms repeal any previously existing rule of law, but it confers on the mortgagor a right in opposition to a previously existing rule, and at the same time permits him to waive that right by contract. The result, it is conceived, is to substitute consolidation by contract of the parties in place of consolidation by rules of equity, so that where a contract is not effectual the right to consolidate does not arise. The contract in effect gives, in certain cases, a further charge on other property, and is effectual only where the further charge would be effectual. Thus if A. purchase the equity of redemption of two estates, each from a different vendor, each estate being mortgaged to the same mortgagee, neither vendor was ever in a position to give a further charge on the other estate to his mortgagee, and there can be no consolidation of the two mortgages.

In what cases there will be no consolidation.

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Costs of foreclosure of two separate mortgages.

The whole costs of an action to foreclose two estates separately mortgaged to the same mortgagee by the same mortgagor to secure separate sums, must be paid on the redemption of either estate, but not twice over: *Clapham* v. *Andrews*, 27 Ch. D. 679.

Effect of subs. 3.

The effect of subs. 3 is to reserve to a mortgage made before the commencement of the Act its old right in equity to become consolidated with another mortgage, whatever may be the date of the latter.

In ordinary cases the mortgagee will be content to rely on the one security taken by him as being sufficient, and will not reserve the right to consolidate. In special cases, as loans to builders, where it is intended to make numerous advances, the right to consolidate will be reserved. Where the contract is for a single loan on specific property, there can be no more obligation on the solicitor of the vendor to obtain a further charge on other property contingent merely on its becoming vested in his client as mortgagee, then to take a charge on all other present and future property of the mortgagor.

Leases.

Leases.

Leasing powers of mortgagor and of mortgagee in possession.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

The prior incumbrancers mentioned in this subs. are those becoming such after the commencement of the Act, but by agreement incumbrancers who became such previously may be included (see subs. 16).

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

See definition of building lease, s. 2 (x.).

As to mining lease.

A mining lease is not authorized by this s., as it involves an abstraction of part of the security, but it can be brought within this s. by agreement (see subs. 14).

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

The time during which a peppercorn rent is payable can be shortened: see subs. 13.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

The penalty for omitting to deliver the counterpart is that the power

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of sale becomes exercisable (see s. 20 (iii.)). The validity of the lease is not affected.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

A contrary intention (if any) will be expressed by the mortgagor and mortgagee in the mortgage deed, whether the mortgagee executes or not. The mere acceptance by him of the security binds him, as in the ordinary case of an agreement not to call in the principal money for a fixed term, or for reduction of interest.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

Special provisions allowed.

This subs. enables special provisions to be made as to leasing, and leases made in accordance with such provisions will be in the same position as leases authorized by this section.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made

before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

This subs. enables the provisions of this s. to be applied in case of mortgages made before 1881.

Mortgage after the Act under agreement.

Under an agreement made before this Act to execute a mortgage containing a power of sale and all usual clauses, the mortgagee is not entitled to have the operation of this s. excluded: *Nugent & Riley's Contract*, W. N. 1883, 147; 49 L. T. 132.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

Subs. 17, extending the provisions of this s. to agreements whether in writing or not for leasing or letting, must be read in connection with the Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, and with 8 & 9 Vict. c. 106, s. 3, by the combined operation of which enactments a lease for three years or less may be in writing or parol, but a lease for more than three years must be by deed: see Woodfall, L. & T. 127, 13th ed.

Parol agreement.

The effect of the words "so far as circumstances admit," is that subss. 7 and 8 as to covenant, condition of re-entry, and counterpart do not apply to a parol agreement, and subs. 7 as to covenant does not apply to an agreement in writing, except that there ought to be the nearest approach to a covenant, namely an agreement to pay rent.

License.

This subs. does not apply to a mere license to occupy: *Ayling* v. *Mercer*, W. N. 1885, 166.

This s. removes serious difficulties in granting leases of mortgaged property (see Woodfall, L. & T. 50, *et seq.*, 13th ed.

Effect of leases under this s.

Power is given to the person in possession, whether owner or incumbrancer, to grant, or contract to grant (subs. 12), leases of the kind specified in subs. 3, conformable to the other provisions of this s. These leases will be binding on all other persons interested, and will confer a valid legal term, leaving a legal reversion in the mortgagee. The rent and the benefit of the lessee's covenants (see s. 10) will become annexed to the actual legal reversion, and thus the owner and incumbrancers will be in the same position as if they had all joined in granting the lease (see *Greenaway* v. *Hart*, 14 C. B. 340). The actual legal reversioner will have the same remedies as to recovery of rent, suing on covenants, and re-entry for condition broken, and be in the same position as if he had granted the term, and will be entitled to the counterpart under subs. 8 or 11 as the case may be. The lessee will also, to the extent of covenants or clauses authorized by the mortgage deed to be inserted in the lease (see subs. 14), have the same rights

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against the actual reversioner and persons claiming under him as if he had made or joined in making the lease (see s. 11); but this section taken alone only authorizes the simple lease, and does not authorize any covenant or provision imposing liability on a mortgagor or mortgagee not a party to the lease.

Effect of excluding operation of s. 18.

If the mortgagor's power to lease given by this s. is excluded, then under a lease made by the mortgagor after the mortgage the mortgagee has no reversion, the covenants by the lessee are covenants in gross, and cannot be sued upon by the mortgagee if he forecloses or takes possession, nor by a purchaser from him if he sells, unless the mortgagor joins in conveying: see *Cuthbertson* v. *Irving*, 6 H. & N. 135; *Morton* v. *Woods*, L. R. 3 Q. B. 658, 4 *ib.* 293. The only remedy of the mortgagee when he takes possession is to eject the lessee. This in most cases is not desired, and is an inadequate remedy, especially in the case of house property, where an essential part of the value of the reversion consists in an available remedy against the tenant on the covenants to paint, repair, deliver up in repair, &c. In the case of agricultural land also, the covenants may be of importance if only to give the right to an injunction. Also if the operation of the Act be excluded, acceptance of rent by the mortgagee, or by a purchaser from him, will constitute the lessee simply tenant from year to year at Common Law, without reference to the terms of the lease, unless a special agreement be previously made (Woodfall, L. & T. 53, 13th ed.; *Corbett* v. *Plowden*, 25 Ch. D. 678), and in the case of agricultural land, will bring into operation the Agricultural Holdings Act, which renders necessary a year's notice expiring with a year of tenancy. On the other hand, if the lease be made under this s. the mortgagee on taking possession has his remedy for rent on the covenants (*Municipal &c., Building Soc.* v. *Smith*, 22 Q. B. D. 70), and is not affected by any collateral agreement between the mortgagor and the lessee.

If any restriction is to be placed on the power of the mortgagor to lease under this s., it should at most extend to prevent him from granting leases either without certain desired restrictions or without the consent in writing of the mortgagee. The mortgagor must generally, to make his property available, grant leases of some kind, and it is not advisable to compel him to lease as equitable owner only.

Agricultural Holdings Act.

A sum due for compensation under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), in respect of a lease granted by a mortgagor under this s. would not, it is conceived, be recoverable personally against the mortgagee, but would be only a charge on the holding as against him (s. 31), he being a landlord entitled to receive rents and profits in a "character otherwise than for his own benefit."

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Sale should be expressed to be under this Act.

A conveyance by a mortgagee selling under the following power should, as is customary in the case of powers given by deed, expressly refer to the power. This, however, is only necessary for the

purpose of obtaining the benefit of s. 21 (2), which (following Lord Cranworth's Act, s. 13) only exempts a purchaser from the consequences of an irregularity when the sale is in professed exercise of the power of sale conferred by this Act.

*Mortgage should be by deed.

*This s. only applies to mortgages by *deed:* subs. (1).

Several mortgages for separate sums.

Where several mortgagees claim under one mortgage, though in distinct sums, it is conceived that all must join in the exercise of the powers conferred on a mortgagee by this Act: see s. 2 (vi.), where "mortgage money" means money, *i.e.*, the whole money secured by the mortgage, and "mortgagee" (which includes the plural) must necessarily have a corresponding meaning; but in mortgages of that kind, and in all other special cases, express provision should be made as to who is to exercise the powers (see, for this purpose, subss. 2 and 3 of s. 19).

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

As to the exercise of the power of sale conferred by this s., the conveyance and the application of the sale money, see ss. 20, 21, and as to the power of a mortgagee to give receipts for the sale or other money or securities comprised in the mortgage, see s. 22.

Mortgaged estate sold with other property.

As to the duty of mortgagees where the mortgaged estate is sold with other property, see the analogous case of the sale of trust property, note to s. 35.

Bills of Sale Act, 1882.

The statutory form in the Bills of Sale Act, 1882, does not incorporate the power of sale given by this Act: *Calvert* v. *Thomas*, 19 Q. B. D. 204.

Trade fixtures.

The words in subs. (1) "or any part thereof" do not authorize a sale of trade machinery separately from the land: *Re Yates, Batcheldor* v. *Yates*, 38 Ch. D. 112. It would seem to follow that mines could not be sold separately from surface.

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(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

When mortgagee may insure.

Under this subs. the mortgagee will be justified in insuring, unless the mortgagor shews by delivering receipt for premium, or otherwise, that a proper insurance is maintained.

As to the amount and application of the insurance money and the cases in which the mortgagee is not by this Act authorized to insure, see s. 23.

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

As to the appointment, powers, &c., of a receiver, see s. 24.

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

Proceeds of timber.

The proceeds of the sale of timber will be rents and profits, and applied accordingly.

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

Powers more extensive than in Lord Cranworth's Act.

This section replaces Part II. of Lord Cranworth's Act, 23 & 24 Vict. c. 145, which is repealed (see second schedule to this Act, Part III.), and gives the more complete and extensive powers now usually inserted in mortgage deeds. Lord Cranworth's Act only applied to hereditaments. This s. applies to "property" generally, which word includes all real and personal estate, choses in action, and every right or interest which is capable of being mortgaged: see s. 2 (1).

The mortgage deed may extend or restrict the powers given by this Act, and the extended or restricted powers have effect under subs. 2, as if conferred by this Act.

Regulation of exercise of power of sale.

20.—A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

Notice.

As to giving notice, see s. 67.

How and to whom to be given.

Where a first mortgage contained a power of sale with a proviso that the power should not be exercised without giving notice to the mortgagor or his *assigns*, the mortgagee having received notice of a second mortgage was held liable in damages to the second mortgagee for not giving him notice before selling (*Hoole* v. *Smith*, 17 Ch. D. 434), and notice to the mortgagor alone was held insufficient, but it was not decided whether notice to the second mortgagee alone would have been sufficient. It is conceived that the mortgagor is not entitled to burden his mortgagee with more than one notice, at least where it is to be given to the mortgagor *or* his assigns. As "mortgagor" includes "any person entitled to redeem according to his estate, interest, or right in the mortgaged property," the expression "one of several mortgagors" means, it is conceived, "one of the several persons entitled, &c., according to his estate," &c., and that it is sufficient if notice of sale be given to the first subsequent incumbrancer who has given notice of his security to the mortgagee who sells.

Mode of excluding this section.

Where an immediate power of sale is desired without notice and without the other restrictions in this section, the proper course will be to agree that the mortgagee shall have the power of sale conferred by

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this Act, but without the restrictions on the exercise thereof imposed by this s.

Month means calendar month.

"Month" in this Act means calendar month: 13 & 14 Vict. c. 21, s. 4. Where the months are broken the computation of a calendar month commences from a given day in one month to the day with the corresponding number in the ensuing month: *Freeman* v. *Read*, 11 W. R. 802. The first day is excluded: *Young* v. *Higgon*, 6 M. & W. 49.

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Under this subs. the power of sale arises on breach of a provision which the mortgagor ought to observe, as for instance, in a mortgage of a life interest and policy of assurance, on a breach of the covenant as to keeping the policy on foot.

Conveyance, receipt, &c., on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

Mode of exercising power of sale.

Under this s. the mortgagee will proceed exactly as under the ordinary power of sale in a deed. He will convey the freeholds and also any customary freeholds passing by deed and admittance, and also his equity in copyholds by deed. As to copyholds passing by surrender and admittance, if he has a surrender, or if the mortgage was made by a tenant for life, or a person having the powers of a tenant for life, under S. L. A., 1882, s. 20, he will be admitted and surrender to the purchaser. If he has no surrender, and the mortgage was not made

under that Act, the legal estate must be obtained by vesting order or otherwise as before the Act.

A mere surrender of copyholds by way of mortgage, if not under seal, confers no power to sell, and it may be a question whether a deed containing a mere covenant to surrender would confer the power, but a covenant to convey freeholds would confer the power, and a covenant to surrender copyholds is a similar covenant to convey. In order clearly to give the power the deed should contain an express charge (which is included in the expression "mortgage," see s. 2 (vi.)), and also a declaration that the mortgagor holds the copyholds in trust for the mortgagee, so as to enable a vesting order to be obtained if required.

Mere surrender gives no power to sell copyholds.

Declaration of trust by mortgagor as to copyholds,

A similar declaration of trust of a term in leaseholds should be contained in a mortgage by demise.

And as to leaseholds.

Under s. 15 of Lord Cranworth's Act (23 & 24 Vict. c. 145) it has been held that a mortgagee by sub-demise of leaseholds could assign the whole of the original term (*Hiatt* v. *Hillman*, 19 W. R. 694), and in *Solomon & Meagher's Contract* (40 Ch. D. 508) that an equitable mortgagee, selling after 1881 under that Act, could convey the legal estate. This s. confers no such power (*Hodson & Howes' Contract*, 35 Ch. D. 668), but it can be conferred by means of an irrevocable power of attorney under C. A., 1882, s. 8, which remains in force notwithstanding the death of the principal, but ceases on the death of the attorney.

Power to convey under Lord Cranworth's Act.

Power under this Act.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

This subs. will not protect a purchaser buying with actual knowledge that the requisite notice was not given: *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; *Selwyn* v. *Garfit*, 38 Ch. D. 273.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as

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incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

As to paying prior charges.

Surplus to subsequent incumbrancer.

As to payment of surplus.

Under this subs. the mortgagee is authorised not merely to discharge prior incumbrances, but to pay in the sum required under s. 5 to be paid into Court to answer them. He can then sell free from incumbrances. The last words of this subs. include a subsequent incumbrancer (s. 22), to whom therefore a mortgagee may pay any surplus.

The mortgagee must, however, take care that he pays the residue to the right person: see *W. London Commercial B.* v. *Reliance Bg. Soc.*, 27 Ch. D. 187, 29 *ib.* 954. This is a liability which as trustee of the residue he cannot avoid, but in a doubtful case he can pay the money into Court: see *Roberts* v. *Ball*, 24 L. J. (Ch.) 471; Morg. Ch. Acts, 52 (*a*), 6th ed.; or he may invest it for the benefit of the persons entitled: *Charles* v. *Jones*, 35 Ch. D. 544, 550.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Payment of prior incumbrances.

A mortgagee exercising his power of sale can, under s. 5, pay into Court the amount required to answer prior incumbrances. On a sale by a second or subsequent mortgagee, being a person entitled to redeem

(see definition of mortgagor, s. 2 (vi.)), he can, as against a prior mortgagee, under deed subsequent to 1881, obtain production of the title deeds so as to shew the title; and having made the proper payments under s. 5 to answer all prior incumbrancers, he is entitled under this subs. to recover the title deeds from the first mortgagee, who would then be a bare trustee of the legal estate.

Production of deeds.

Recovering deeds.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

Mortgagee's receipts, discharges, &c.

The receipt of the mortgagee is a complete protection to a *bonâ fide* purchaser without notice, even though the security should prove to have been satisfied (*Dicker* v. *Angerstein*, 3 Ch. D. 600).

Mortgagee's receipt valid though security satisfied.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

This s. enables a mortgagee to give a discharge, not only for money arising by sale, but also for money or securities assigned by the mortgage or arising thereunder; for instance, to give a receipt for the surplus on a sale by a prior mortgagee, or in case of a mortgage of a policy or of a reversionary interest in stock, to give a receipt for the policy money or for the stock, and to apply the money in discharge of the debt and costs, and in case of stock, to sell the stock for that purpose.

Mortgagee's receipt for surplus sale money and securities.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed

Amount and application of insurance money.

two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is, by this Act, authorised to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

When insurance money to be expended on reinstating.

Under 14 Geo. 3, c. 78, s. 83, insurance money on houses and buildings must at the request of any person interested, or may in cases of suspicion, be applied in reinstating them: see *Ex parte Gorely*, 4 D. J. & S. 477.

Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

Under this subs. the receiver acts subject to the rights of any prior mortgagee and to the powers of his receiver (see n. to subs. 8).

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums,

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having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

Position of a receiver.

The power to appoint a receiver is by s. 19 given to the mortgagee to the like extent as if in terms conferred by the mortgage deed. The receiver of a second or subsequent mortgagee will therefore (see subs. 3 of this s.) be liable to be superseded by the receiver of a prior mortgagee when appointed, but the receiver for the time being, whether under a first or any subsequent mortgage, will, it is conceived, have under subss. 3 and 4 power to recover and give a legal discharge for rent. To prove that the person appointing the receiver is actually a mortgagee, the mortgage deed must be produced. Where it is desired to avoid this, a counterpart of the mortgage may be taken. As mortgage deeds will in future be short, the cost of a counterpart will be much less than that of the old receivership deed.

Power to appoint, how proved.

Repairs by receiver.

Any necessary or proper repairs which a mortgagee could not himself make, unless expressly authorised, without incurring the liability of a mortgagee in possession, may be made by the receiver, if directed in writing by the mortgagee under subs. 8 (iii.).

Distress after receiver appointed.

Appointment by Court.

When a receiver under this Act has been appointed the Court will restrain the mortgagor from distraining for rent, even, it seems, though the receiver be negligent: *Bayly* v. *Went*, W. N. 1884, 197. When an action is pending the receiver should be appointed by the Court, and not under this Act: *Tillett* v. *Nixon*, 25 Ch. D. 238.

Action respecting mortgage.

Sale of mortgaged property in action for foreclosure, &c.

Action respecting Mortgage.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either

for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

Action respecting mortgage.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed.

(7.) This section does not extend to Ireland.

As to this s., see observations on s. 5.

15 & 16 Vict. c. 86, s. 48.

The result of decisions (see Morgan's Chancery Acts, 196, 197, 5th ed.) was to give a very limited operation to s. 48 of 15 & 16 Vict. c. 86, now repealed (see second schedule, Part II.), and replaced by this s.

Orders for sale under this s.

An order for sale may be made under this s. in a foreclosure or redemption action at any time before the action is concluded by a foreclosure absolute: *Union B. of L.* v. *Ingram*, 20 Ch. D. 463; on an interlocutory application before trial of the action: *Woolley* v. *Colman*,

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Action respecting Mortgage.

21 *ib.* 169; or even on the motion for foreclosure absolute where a summons for further time has been previously taken out: *Weston* v. *Davidson*, W. N. 1882, 28.

An order for sale still usually directs the sale to be made, as before this Act (see Seton, Decrees, 1396, 802, 4th ed.), subject to the incumbrances of such of the incumbrancers as do not consent. But the sum to meet their charges can be paid into Court under s. 5. Any whose charges cannot be so provided for must be made parties.

The owner of, or any incumbrancer on, an incumbered estate can under this s. bring an action for sale and application of the proceeds (see note to s. 5), but before commencing an action for redemption or sale he should be certain that he can provide the requisite deposit or security for costs, otherwise he may find himself foreclosed.

Course where sale asked by mortgagee or mortgagor.

If the mortgagee asks for a sale under this s., the course of proceeding will be much the same as before the Act in a similar case. If the mortgagor asks for a sale instead of being foreclosed as defendant, or bound to redeem as plaintiff, the course of proceeding is new. In *Woolley* v. *Colman*, 21 Ch. D. 169, the owner of the equity of redemption was plaintiff, the property being subject to several mortgages. A sale was directed at a reserve price sufficient to pay the two first mortgagees, who opposed a sale, and with the assent of the subsequent mortgagees the conduct of the sale was given to the mortgagor, who was ordered to give security for the costs of it. Where the mortgagor was defendant, and had the conduct of the sale, he was not ordered to give security for costs: *Davies* v. *Wright*, 32 Ch. D. 220. In both these cases the sale was allowed to be made out of Court, but the proceeds were directed to be paid into Court. In *Wade* v. *Wilson*, 22 Ch. D. 235, a foreclosure action, in which one of the defendants, the mortgagor, did not appear, and the other, the second mortgagee, made default in pleading, the usual account was directed, and then a sale of a sufficient part of the property to pay the amount found due to the plaintiff. In *Oldham* v. *Stringer*, W. N. 1884, 235, there was a deposit of deeds without any memorandum, and a sale was ordered instead of foreclosure. A sale was ordered also in *Green* v. *Biggs*, W. N. 1885, 128, and in *Jones* v. *Harris*, W. N. 1887, 10, but was refused in *Merchant Banking Co.* v. *London & Hanseatic Bank*, W. N. 1886, 5, 55 L. J. Ch. 479.

V.—STATUTORY MORTGAGE.

STATUTORY MORTGAGE.

Form of statutory mortgage in schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there

shall by virtue of this Act be implied, in the mortgage deed— SS. 26, 27. STATUTORY MORTGAGE.

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money.

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor or as he shall direct.

Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the

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interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of, and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of its being designated a mortgage.

A transfer of a mortgage, although further security is given, is only chargeable with duty as a transfer (33 & 34 Vict. c. 97, s. 109; *Wale* v. *Commissioners of In. Rev.*, 4 Ex. D. 270).

Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as cove-

nantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect to the share or distinct sum secured to him.

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STATUTORY MORTGAGE.

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

Form of re-conveyance of statutory mortgage in schedule.

The object of ss. 26–29 is to enable mortgages, transfers of mortgage, and re-conveyances to be made in very short forms. The forms are given in the third schedule. They do not readily admit of alteration, and will probably be used only in quite simple cases, where proper legal advice is dispensed with.

VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

TRUST AND MORTGAGE ESTATES ON DEATH.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and

Devolution of trust and mortgage estates on death.

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TRUST AND MORTGAGE ESTATES ON DEATH.

obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

37 & 38 Vict. c. 78. 38 & 39 Vict. c. 87.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

Copyholds.

Copyholds or customary lands are "an estate or interest of inheritance" in "tenements or hereditaments" and seem clearly to have been included in this s., and it has been so held (*Re Hughes*, W. N. 1884, 53). It has now been partially repealed as to copyhold or customary land by the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45, which received the royal assent on the 16th September, 1887, and is as follows:—

Copyhold Act, 1887.

45. The thirtieth section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage.

Unadmitted mortgagee.

Where the mortgagee (as mostly happens) is not admitted and dies the land is not at his death vested in him as tenant on the Court Rolls, and the right to admittance seems still to vest in his personal representatives under s. 30. An unadmitted heir or devisee of a mortgagee seems to be in the same position.

Extent of the repeal.

No time is specified for the commencement of s. 45 of the Copyhold Act, 1887, or of the repeal. The result is that s. 30 must now be read as having never applied to copyhold or customary land to which a trustee or mortgagee has been admitted. Such land as from the 31st December, 1881, up to the 16th September, 1887, is divested out of the personal representative and revested in the customary heir or the devisee of trust and mortgage estates unless in the meantime a conveyance has been made by the personal representative (*Re Mills' Trusts*, 37 Ch. D. 312, 40 *ib.* 14). If this holds good where the personal representative has been admitted then a second fine will now be necessary on admittance of the heir.

The repeal effected by s. 45 of the Copyhold Act, 1887, is only directed to s. 30 of this Act, consequently as regards deaths before 1st January, 1882, when the C. A., 1881, took effect. s. 4 of the V. & P. A. still remains in force. The confusion introduced by s. 45 seems considerable. The object was to avoid the larger fine payable on ad-

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mittance of a stranger in some manors, and might have been attained by giving the personal representative power to convey.

As regards those hereditaments to which alone s. 30 now applies, namely, hereditaments which are not of copyhold or customary tenure, or hereditaments of either of those tenures to which there has been no admittance, that s. operates to constitute the executor or administrator devisee of trust and mortgage estates (*Re Hughes*, W. N. 1884, 53). Whether as to any particular land he is such devisee will be shewn in the same manner as if there were an actual devise.

Personal inheritance.

The word "hereditaments" includes, more clearly than the word "land," a personal inheritance, as an annuity to one "and his heirs." (See Co. Lit. 2 a, 20 a; *Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Holdernesse* v. *Carmarthen*, 1 Bro. C. C. 377). Such annuities are sometimes granted by corporations (Manchester, for instance) charged on the borough fund.

No question as to assent arises.

No question as to assent by an executor arises under this s. He is put in the position of devisee, and cannot properly convey a trust estate except to a duly appointed trustee; nor does an executor generally assent to a bequest of leaseholds held in trust, he only assigns them to a duly appointed trustee; nor to a bequest of leaseholds in mortgage, as he retains the legal estate in order to get in and receive the money.

Heir excluded as trustee.

The constitution of the personal representative to be trustee operates like a devise to exclude the heir from being trustee.

Whether the heir takes until administration.

In the case of *Re Pilling's Trusts*, 26 Ch. D. 432, Pearson J. asked, "What happens when there is no personal representative? If the legal estate does not vest in the heir, where is it?" The same might be asked as to a term of years. In the Colony of Victoria it has been decided that until administration the land descends to the heir-at-law, who can maintain ejectment, but upon grant of administration it vests in the personal representative as from the death: *Larkin* v. *Drysdale*, 1 Vict. L. Rep. (Law) 164; Wood's Laws of the Australasian Colonies, p. 110. Clearly the heir cannot convey the fee, as he, if taking, takes only until a representative is constituted, and in the absence of a personal representative a vesting order is necessary: *Rackstraw's Trusts*, 33 W. R. 559, W. N. 1885, 73; *Williams' Trusts*, 36 Ch. D. 231.

Executors may convey before probate.

Executors derive their title from the will, not from the probate, and can under this s. convey before probate a legal freehold as well as a term held in trust by their testator. Probate is only proof of their title. If all the executors die before probate, subsequent letters of administration are sufficient proof of that title (Wms. Exors., 309, 8th ed.).

Devise of trust estates how far proper.

It will now be unnecessary, and also useless, to make any devise of trust or mortgage estates, not being of copyhold or customary tenure. Their devolution is assimilated in all respects to the devolution of a term of years, which must pass to the personal representative; and notwithstanding any devise, the personal representative is the person to convey, and is in all cases the "heir" and "assign" for the purpose of exercising all trusts and powers.

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TRUST AND MORTGAGE ESTATES ON DEATH.

On the death of a personal representative a new representative must be constituted as in case of personalty. If the executor of a trustee or mortgagee dies and there is no executor to his estate, letters of administration must be taken out to the trustee or mortgagee. The title to a freehold trust or mortgage estate (see *Re Hughes*, W. N. 1884, 53) will in fact be made exactly as if it had been a term of years held in trust or mortgage.

Title to freehold trust estate same as leasehold.

Though a freehold trust or mortgage estate now passes to the personal representative it must still be conveyed to the trustees or mortgagees "and their heirs" or "in fee simple" (see s. 51), in order to give them the fee simple.

Trust estate must still be limited to "heirs," &c.

The powers of trustees devolve only on those who are specified as persons to execute the trust; and s. 38 carries the power to the survivor where the trust is created after 1881. Thus a devise to A. and B. on trust to sell, enables A. and B. and also the survivor of them to sell. The decision in *Osborne* v. *Rowlett*, 13 Ch. D. 774, appears to be an authority that the same applies to trusts created before 1882, but as to the actual decision see *Re Morton & Hallett*, 15 Ch. D. 143. Where heirs are not specified, the heir of the survivor could not, as it seems (see *Re Morton & Hallett*), before 1882 have sold, though the fee devolved on him, consequently the personal representative of the survivor could not now sell: *Re Ingleby & the Norwich Union Co.*, 13 L. R. Ch. D. Ir. 326. If the devise is "to A. and B. and their heirs on trust to sell," or to A. and B. in fee simple upon trust "that they and their heirs," or "executors or administrators," or "the trustees or trustee for the time being" (*Re Morton & Hallett*) "shall sell," then under s. 30 the personal representative of the survivor can sell. The effect of s. 30 is that there cannot now except as to copyhold and customary hereditaments be any "assign" of a trust estate by means of a devise. The only "assign" is a trustee duly appointed, and s. 31 (5) gives him all the powers of an original trustee, so that except as before-mentioned it is unnecessary now to specify assigns in order to enable them to execute the trust.

Devolution of powers of trustees.

When vendor trustee for purchaser.

Where there is a valid contract binding on both vendor and purchaser, and at the vendor's death, either he has made out his title according to the contract, or the purchaser has accepted the title however bad, the vendor is a trustee for the purchaser (*Lysaght* v. *Edwards*, 2 Ch. D. 506, 507), and this s. applies.

Cases affected.

This s. renders obsolete, as regards persons dying after 1881 (except as to copyhold and customary land to which there has been an admittance) all the decisions as to what words pass trust and mortgage estates, and as to whether the trusteeship passes to the devisees of trust estates, discussed in 1 Jarm. Wills, p. 709 *et seq.* 4th ed. If a testator wishes that his trust estates should go to particular persons, he can appoint them executors for that special purpose: see Wms. Exors. 387, 8th ed.

Every will should now contain a devise to the executors of all copyhold or customary land held on trust or by way of mortgage.

As to the s. of the Land Transfer Act, 1875, repealed by this s., see note to V. & P. A. s. 5.

VII.—Trustees and Executors.

S. 30.

Trustees and Executors.

Powers of trustees.

The following is a summary of the powers conferred on trustees by the C. A., and the provisions relating to trustees and trust estates contained in that Act, the V. & P. A., the C. A., 1882, and the Trustee Act, 1888.

Trustees

(i.) May under a trust or power of sale, sell, or concur in selling, by auction or private contract, together or in lots, &c.: C. A. s. 35;

(ii.) May as vendors or purchasers adopt the conditions implied in the C. A. (see s. 66 of this Act), or in s. 2 of the V. & P. A. (see s. 3 of that Act);

(iii.) May give receipts: C. A. s. 36;

Of the above (iii.) is retrospective, (i.) and (ii.) are not, and apply so far as a contrary intention is not expressed in the instrument of trust:

(iv.) May manage land of an infant, but in case of a female only while she is unmarried, and may apply the income thereof for maintenance, education, or benefit, and accumulate surplus: C. A. s. 42;

(v.) May apply in like manner the income of any property in which any infant is interested: C. A. s. 43;

Of these (iv.) and (v.) apply only so far as a contrary intention is not expressed in the instrument under which the infant's interest arises; (v.) is retrospective, (iv.) is not.

Powers of executors.

(vi.) Trustees or an executor (but not an administrator) may compound and compromise, and an executor may pay or allow any debt or claim: C. A. s. 37;

(vii.) Powers or trusts given to executors or trustees are exercisable by the survivors or survivor: C. A. s. 38.

Of these (vi.) is retrospective, (vii.) is not; (vi.) in regard to trustees, and (vii.) in regard to executors or trustees, apply only if a contrary intention is not expressed in the instrument of trust.

(viii.) A married woman being a bare trustee of freeholds or copyholds may convey or surrender them as a feme sole: V. & P. A. s. 6. (This provision is superseded by the M. W. P. A., 1882, as to a woman married or becoming a trustee after 1882).

The C. A. contains also provisions:

(ix.) For the appointment of new trustees with power to increase the number but without any obligation to appoint more than one where only one was originally appointed, or to fill up the original number where more than two were originally appointed: s. 31;

(x.) For the retirement of a trustee without appointing a successor, provided at least two trustees remain: s. 32;

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(xi.) For giving trustees appointed by the Court the powers of original trustees: s. 33;

(xii.) For vesting the trust property on the appointment of a new trustee, or the retirement of a trustee under (x.): s. 34, with the exceptions mentioned in subs. 3;

(xiii.) For the devolution of the trust estate (except copyhold and customary land to which there has been an admittance, 50 & 51 Vict. c. 73, s. 45) on the personal representatives of a sole trustee dying after 1881, notwithstanding his will: s. 30.

The C. A., 1882, s. 5, provides

(xiv.) For the appointment of separate sets of trustees.

Of these (ix.) to (xi.) and (xiv.) are retrospective; (xii.) applies only to deeds, executed after 1881, appointing new trustees under s. 31, or authorizing retirement under s. 32; (xiii.) is not retrospective.

The Trustee Act, 1888, enables trustees

(xv.) To insure: s. 7;

(xvi.) To invest on mortgage of long terms: s. 9;

(xvii.) To renew leaseholds: s. 10;

(xviii.) To raise money for renewals: s. 11.

Appointment of new trustees, vesting of trust property, &c.

31.—(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

A disclaiming is a refusing trustee.

This s. includes the case of disclaimer. After disclaimer, which relates back, the person disclaiming is considered as never having been a trustee, but up to the time of disclaimer the trust estate remains vested in him, otherwise there would be nothing to disclaim. The estate being vested in him on trust at the moment of disclaimer, he necessarily is then a trustee, and is a trustee who refuses. The estate

passes to him without any express assent, but subject to the right of dissenting: see Lewin, 176, 6th ed.; *Smith* v. *Wheeler*, 1 Vent. 128; *Siggers* v. *Evans*, 5 Ell. & Bl. 367, 382. In *D'Adhemar* v. *Bertrand*, 35 Beav. 19, it was assumed that a disclaiming trustee was included in the words "trustee who shall refuse to act" under Lord Cranworth's Act, s. 27; see also Lewin, 541, 6th ed. Disclaimer of the office of trustee is also a disclaimer of the legal estate: *Re Birchall*, *Birchall* v. *Ashton*, W. N. 1889, 31.

Bankruptcy is unfitness.

A bankrupt trustee is a trustee unfit to act: *Barker's Trusts*, 1 Ch. D. 43. He is bound to retire if requested, and may be removed under s. 117 of the Bankruptcy Act, 1869: *Adams' Trust*, 12 Ch. D. 634 (see now s. 147 of the Bankruptcy Act, 1883).

Continuing trustee.

A "continuing trustee" is one who is to continue to act after an intended appointment of new trustees: *Re Coates to Parsons*, 34 Ch. D. 370.

Such a continuing trustee may therefore alone appoint a new trustee in the place of a trustee out of the jurisdiction (*Re Coates to Parsons*, 34 Ch. D. 370), or in place of a lunatic trustee (*Re Elizabeth Blake*, W. N. 1887, 173); and the same must apply to the case of a bankrupt trustee or a trustee otherwise unfit to act or incapable of acting, except it seems where the incapacity arises from infancy (*Re Tallatire*, W. N. 1885, 191) which is not a total incapacity. The result is that where a continuing trustee is authorized to appoint a new trustee he can effect the removal of his co-trustee and can also under s. 34, as regards property to which that s. applies, divest the trust estate out of the removed trustee.

Lunatic.

Infant.

Power of continuing trustee.

Who is a continuing trustee.

A deceased sole trustee is a last surviving or continuing trustee: *Shafto's Trusts*, 29 Ch. D. 247. A trustee who has made up his mind to retire is not a continuing trustee: *Travis* v. *Illingworth*, 2 Dr. & Sm. 344; *Re Norris*, *Allen* v. *Norris*, 27 Ch. D. 333, dissenting from *Re Glenny & Hartley*, 25 Ch. D. 611. Nor is he a surviving trustee within the meaning of a power given to the surviving trustee, though he is the actual survivor: *Travis* v. *Illingworth*, *ubi sup.*

It is not necessary that a retiring trustee should join in the appointment of a new trustee by a continuing trustee: *Re Norris*, *Allen* v. *Norris*, 27 Ch. D. 333.

No obligation to appoint.

A continuing sole trustee (*Peacock* v. *Colling*, 33 W. R. 528) or the personal representative of a deceased trustee (*Sarah Knight's Will*, 26 Ch. D. 82) is not bound to appoint a new trustee.

Donees disagreeing.

Where joint donees of a power to appoint fail to agree, an appointment may be made by the continuing trustees under this s.: *Re Sheppard's Trusts*, W. N. 1888, 234.

Whether trustee under S. L. A. can appoint.

In the case of *Re Wilcock*, 34 Ch. D. 508, North, J., doubted whether under this s. new trustees could be appointed for the purposes of the S. L. A., 1882. The words "whether appointed by the Court or otherwise" expressly provide for filling the place of a trustee appointed by the Court, and it seems necessarily to follow that the trustee continuing in office may make the appointment whether he is a trustee appointed by the Court or by deed, otherwise the s. only

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provides for the uncommon case of one trustee being appointed by deed and one by the Court, and a vacancy occurring as to the latter only. The expression "instrument (if any) creating the trust" shews that not merely trusts created by writing but trusts of every kind were intended to be provided for. Moreover "instrument" is defined to include an Act of Parliament: s. 2 (xiii.); and in *Re Lloyd's Trusts*, W. N. 1888, 20, s. 30 was held to apply to trustees of a power of sale given by a private Act. Also s. 33 expressly provides that "every trustee appointed by the Court," &c., "shall have the same powers," &c., "as if he had been originally appointed a trustee by the instrument (if any) creating the trust;" so that trustees appointed by the Court under s. 38 of the S. L. A., 1882, must be taken to be in the same position as if they had been by the settlement itself appointed trustees for the purposes of the Act, and then certainly the continuing trustee could appoint new trustees. However, no title can now safely be taken on the assumption that s. 31 applies until there has been an actual decision on the point.

Where power extends to all cases in this s.

In settlements made since Lord Cranworth's Act, the form of the power generally is, "that A. B. shall have power to appoint new trustees," without specifying in what cases. Under that form, the power being unlimited, A. B. will be the "person nominated for this purpose" within the meaning of this s. (See *Walker & Hughes' Contract*, 24 Ch. D. 698.)

Where limited to certain cases.

But if the power expressly specifies the cases in which an appointment may be made and includes only some of the cases mentioned in this s., then as regards the remaining cases the donee of the power is not "the person nominated for this purpose" within this s., and the appointment must be made by the surviving or continuing trustee or his personal representatives (see *Cecil* v. *Langdon*, 28 Ch. D. 1). This applies whether the settlement be made before or after the commencement of this Act.

Effect of alienation, &c.

A power to appoint new trustees continues, notwithstanding alienation by the donee of the power of all his interest (*Hardaker* v. *Moorhouse*, 26 Ch. D. 417); and also notwithstanding a decree in an administration action, but then it should be exercised with the sanction of the Court: *Re Gadd*, *Eastwood* v. *Clark*, 23 Ch. D. 134; *Re Hall*, *Hall* v. *Hall*, W. N. 1885, 17.

Appointment by the Court.

The Court will not appoint a new trustee where there is a person able and willing to appoint: *Re Sutton*, W. N. 1885, 122. Where there is a power to appoint which can be exercised, an application to the Court should not be made: *Gibbon's Trusts*, 30 W. R. 287; W. N. 1882, 12.

Where a private Act incorporated the 27th s. of Lord Cranworth's Act, enabling the appointment of new trustees with a qualification that every appointment should be made with the approbation of the Court, it was held that an appointment could be made under this s., and that the qualification did not apply: *Re Lloyd's Trusts*, W. N. 1888, 20.

The registrars in the Probate Registry have refused to grant letters of administration merely for the purpose of enabling the power given by this s. to be exercised where there are no assets.

(2.) On an appointment of a new trustee, the number of trustees may be increased.

This subs. enables the appointment of more than one new trustee, as singular imports the plural, see last n. to s. 2, but it applies only where there is a vacancy: *Gregson's Trusts*, 34 Ch. D. 209; *Nesbitt's Trusts*, 19 L. R. Ir. 509.

This and the next subs. apply to an appointment under a power in a trust deed as well as an appointment under the statutory power (see subs. (7) (8)).

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

"New" trustees.

Two existing trustees cannot, under the Trustee Acts, be re-appointed in the place of themselves and a lunatic trustee, and the practice is not altered by this Act, although the word "new" is not used in subs. 1: *Re Aston*, 23 Ch. D. 217. It is the practice of the Court under those Acts, where there is a continuing trust, not to remove or discharge a trustee without appointing a new trustee in his place: *Re Lamb's Trusts*, 28 Ch. D. 77; *Re Gardiner's Trusts*, 33 *ib.* 590; except under special circumstances: *Davis* v. *Hodgson*, 32 *ib.* 225.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

This subs. must be read in connection with s. 34 (1), rendering a conveyance of the trust property unnecessary on the appointment of a new trustee, except in cases within subs. 3 of that s.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(6.) The provisions of this section relative to a trustee

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who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

The first clause of this subs. does not enable the personal representative of a person nominated a trustee, but dying before the testator, to appoint new trustees: *Re Ambler's Trusts*, 59 L. T. 210; 32 Sol. J. 541. Though nominated a trustee, he never became a last surviving or continuing trustee within s. 31.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

Contrary intention.

Where under an instrument, whether dated before this Act or subsequently, a limited power to appoint new trustees is given to a specified person, say, in case only of trustees refusing, the power given to the surviving or continuing trustee by subs. (1) applies to all the other cases there mentioned, and the omission to provide for all those cases is not sufficient to shew a contrary intention within this subs. (See *Cecil* v. *Langdon*, 28 Ch. D. 1; *Re Coates to Parsons*, 34 *ib.* 370.)

(8.) This section applies to trusts created either before or after the commencement of this Act.

This and ss. 32–38, included in Part VII. of this Act, replace Part III. of Lord Cranworth's Act, which is repealed (see second schedule, Part III.). The power to appoint new trustees applies to all instruments past and future, including those dated before Lord Cranworth's Act, and to which that Act did not apply: see *Re Walker & Hughes' Contract*, 24 Ch. D. 698.

Power retrospective.

Separate sets of trustees.

By the C. A., 1882, s. 5, separate sets of trustees may be appointed for distinct trusts.

Retirement of trustee.

32.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the

deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

Continuing trustees have all powers.

Under this s. the continuing trustees alone will have the powers of the original trustees. The due discharge of one of several trustees leaves the others whole and sole trustees as in case of a disclaimer: *Cafe* v. *Bent*, 5 Hare, 37. If the power be merely personal, unconnected with property, for instance to consent to a marriage, it is not a case of trusteeship within these ss., but the power may be disclaimed under C. A. 1882, s. 6.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

This subs. must be read in connection with s. 34 (2), rendering a conveyance of the trust property unnecessary on the retirement of a trustee except in cases falling within subs. 3 of that s.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

Powers of new trustee appointed by Court.

33.—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(2.) This section applies to appointments made either before or after the commencement of this Act.

Retrospective.

As to exercise of legal powers.

This s. replaces s. 27 of Lord Cranworth's Act, and applies to all instruments past and future. A new trustee appointed by the Court under its ordinary jurisdiction in equity could not exercise a legal power, as, for instance, a power of sale in a settlement operating by revocation and appointment of uses (see *Newman* v. *Warner*, 1 Sim. N.S. 457, 461). To enable a new trustee to exercise a legal power it was necessary that the appointment should be made on petition under the Trustee Act, 1850: see s. 33 of that Act. As to trustees appointed by the Court of Chancery, see Morg. Ch. Acts, 79, 6th ed. It is con-

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ceived that under this s. a trustee appointed by judgment or order in an action simply, and not under the Trustee Acts, may validly exercise legal powers, and that there is no necessity for a petition under those Acts.

Vesting of trust property in new or continuing trustees.

34.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Vesting declaration on all appointments.

This s. applies to all deeds executed after the commencement of the Act by which a new trustee is appointed to perform "any trust," and is not confined to cases where the powers of the Act are exercised. As singular includes the plural, it also applies where more new trustees than one are appointed. The vesting declaration may therefore now be used on an appointment of a trustee in the ordinary mode under a power in a settlement, and whether the settlement be dated before or after the commencement of the Act.

Must be by and in same deed.

It must be by deed and not by writing merely, though the mere appointment of a trustee under s. 31 may be by writing only; and it must be contained in the deed appointing or discharging the trustee.

Stamp duties.

Thus as under the old practice a deed will always be necessary where there is property to transfer, and will be chargeable with stamp duty on the appointment and also on the vesting order (*Hadgett* v. *Commissioners of In. Rev.*, 3 Ex. D. 46).

Chose in action.

In the case of a chose in action notice of assignment should also be given.

No declaration for equities.

The aid of this s. is required only for the purpose of vesting a legal interest. The mere appointment of a new trustee or several new trustees in itself operates to vest all equitable interests in the persons who are the trustees (*Dodson* v. *Powell*, 18 L. J. Ch. 237), and the object of this s. is to extend that principle so far as is not inconvenient to legal estates and rights. It may, however, be convenient to have the proper declaration in all cases.

Effect of vesting clause.

The words "who by virtue of the deed become and are *the* trustees *for performing the trust*" include the old trustees as well as the new. The new trustees become trustees by virtue of the deed, but do not become the trustees for performing the trust, unless they are the sole trustees. The new and the old trustees together become the trustees for performing the trust. But where there are no old trustees, or none

continuing to act, the new trustees solely become the trustees for performing the trust.

Where there should be separate deed.

Cases occur, as where lands are purchased with settlement money, in which it may be convenient to have a separate actual conveyance. The declaration which effects the vesting of the other property subject to the settlement will then omit the property separately conveyed. There must be an actual conveyance where the deed does not contain an appointment of a new trustee or discharge of a trustee.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

Reasons for exceptions.

The objects of subs. 3 are to save the rights of the lord as regards customary land, to prevent the trusts of the money appearing on the title of land mortgaged, and to reserve to companies and other bodies the right to require transfers of their stock to be made in the statutory form.

Vesting order made.

As to property to which the vesting declaration does not apply, and of which a transfer cannot be obtained, a vesting order will be made: *Harrison's Settlement*, W. N. 1883, 31; *Keeley's Trusts*, 53 L. T. 487.

Trust property outstanding.

The vesting declaration applies only to an estate subject to the trust vested in a person who was or is trustee. A transfer of an estate outstanding in any one else must be obtained in the ordinary way. Thus suppose an equity of redemption to be conveyed on trust for sale and the mortgage debt to be afterwards paid off, the mortgagee becomes a trustee of the legal estate, but not a trustee under the deed of trust for sale. On an appointment of new trustees of the deed the vesting declaration would not operate to get in the legal estate vested in the mortgagee.

(4.) For purposes of registration of the deed in any

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registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

Register searches.

This subs. makes it necessary to search the deeds register against any person having power to appoint new trustees as well as against the trustees.

(5.) This section applies only to deeds executed after the commencement of this Act.

Power for trustees for sale to sell by auction, &c.

35.—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

This s. operates to supply the common form provisions of a trust for sale or a power of sale.

As to sale of trust property along with other property.

As to the duty of trustees where trust property is sold along with other property not subject to the trust: see *Rede* v. *Oakes*, 4 D. J. & S. 505; *Cooper & Allen's Contract*, 4 Ch. D. 802. The trustees must exercise their powers in a reasonable manner: *Dunn* v. *Flood*, 25 Ch. D. 629, 28 *ib.* 586, 591.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

Words required in trust for or power of sale.

A sufficient trust for sale may now be created by using the words "Upon trust to sell the said premises," and a sufficient power of sale by using the words "with power to sell the said premises," without more, and the survivors can sell: see s. 38.

36.—(1.) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

Trustees' receipts.

(2.) This section applies to trusts created either before or after the commencement of this Act.

Receipt clause extended.

This s. replaces and is more comprehensive than s. 29 of Lord Cranworth's Act, which was confined to money payable under trusts or powers created after the passing of that Act (s. 34). The power to give receipts conferred by 22 & 23 Vict. c. 35, s. 23, had a similar limited operation.

Application of this section.

Where trustees for sale, having no express power to give receipts, had sold to a railway company, the power given by this Act was held to apply, and the purchase-money, which had been paid into Court, was ordered to be paid to them without serving the *cestuis que trust*: *Thomas's Settlement*, W. N. 1882, 7.

Effect of statutory receipt clause.

All trustees having now a complete statutory power to give a discharge for the funds of which they are trustees, it not only is not necessary to enquire as to a receipt clause, but it is also not material to enquire whether the funds have become vested absolutely in any beneficial owner which would put an end to the operation of the receipt clause operating by contract only. In every case payment or transfer to duly appointed trustees operates as a good discharge whatever may be the position of the beneficial ownership. Though this s. is expressly made retrospective so as to include all trusts created before 1882, yet it only applies to receipts given under such trusts after 1881.

Not retrospective as to receipts.

Power for executors and trustees to compound, &c.

37.—(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's

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estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

Does not apply to an administrator.

This s. does not apply to an administrator, who might be merely a creditor, or some one not necessarily a proper person to be invested with such large powers; see *Re Clay and Tetley*, 16 Ch. D. 3.

Two or more trustees must act together.

It is conceived that where there are two or more trustees they must all act together under this s. except in trusts of a public character or where there is a special authority enabling the majority to bind the minority: see Lewin on Trusts, 259, 8th ed.

Powers to two or more executors or trustees.

38.—(1.) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.

Compare the Act 21 Hen. 8, c. 4.

As to survivor of executors selling.

This s. removes any difficulty as to whether one surviving executor can sell under a devise to executors to sell (see Sug. Powers, 126 *et seq.*, 8th ed.); but it does not affect the rule that a power to two or more by name, who are not executors, being a personal power, will not survive (Sug. Powers, 128, 8th ed.).

VIII.—Married Women.

Power for Court to bind interest of married woman.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Cases affected.

Before this Act the Court had no power to bind the interest of a married woman who was restrained from anticipation, however beneficial it might be to her to do so: see *Robinson* v. *Wheelwright*, 21 Beav. 214, 6 D. M. & G. 535; *Tussaud* v. *Tussaud*, 9 Ch. D. 375, *per* James, L.J.; *Smith* v. *Lucas*, 18 Ch. D. 531.

Applications under this section.

Applications under this s. must be made by summons in Chambers, s. 69 (3), and not by petition: *Re Lillwall's Settlement*, 30 W. R. 243, W. N., 1882, 6.

See on the intention of this s., *Tamplin* v. *Miller*, W. N., 1882, 44; *Re Warren's Settlement*, 52 L. J. Ch. 928, W. N., 1883, 125; and see Orders made under this s. in *Ex parte Thompson*, W. N., 1884, 28; *Sedgwick* v. *Thomas*, 48 L. T. 100; *Musgrave* v. *Sandeman*, *ib.* 215; *Re Flood's Trusts*, 11 L. R. Ir. 355; *Re Wright's Trusts*, 15 *ib.* 331; *Re Seagrave's Trusts*, 17 *ib.* 373; *Hodges* v. *Hodges*, 20 Ch. D. 749; *Re Little's Will*, 36 *ib.* 701; *Re Currey*, *Gibson* v. *Way*, W. N., 1887, 28; and *C.'s Settlement*, 56 L. J. Ch. 556; but refused in *Re Warren's Settlement*, *ubi sup.*; *Re Wheatley*, *Smith* v. *Spence*, 27 Ch. D. 606; *Re Jordan*, *Kino* v. *Picard*, 34 W. R. 270, W. N., 1886, 6; and *Re Little*, *Harrison* v. *Harrison*, 40 Ch. D. 418.

How consent taken.

The consent of a married woman under this s. need not be ascertained by a separate examination: *Hodges* v. *Hodges*, 20 Ch. D. 749; *Harris* v. *Harford*, W. N., 1888, 190; but see *Musgrave* v. *Sandeman*, 48 L. T. 215.

Power of attorney of married woman.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this Act.

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MARRIED WOMEN.

This s. when originally inserted had more special reference to the clauses struck out in the House of Commons enabling married women to convey by deed simply without acknowledgment. An acknowledged deed is necessarily incapable of being executed by attorney, but under this s. a power of attorney will be effectual as regards all other deeds or acts capable of being executed or done by a married woman.

For further provisions as to powers of attorney, see ss. 46–48 of this Act, and C. A., 1882, ss. 8, 9; and see s. 50 of this Act, enabling a married woman to convey freehold land, as defined by s. 2 (ii.), and choses in action to her husband alone or jointly with another person; and see C. A., 1882, s. 7, as to acknowledgment of deeds by married women.

INFANTS.

IX.—INFANTS.

Sales and leases on behalf of infant owner.

40 & 41 Vict. c. 18.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

Sale of infant's land in fee simple.

This s. enables the Court for the benefit of an infant to sell his fee simple estate, not only where he has acquired it under a settlement (see definition of "settlement" in the S. E. A., 1877), but also where it has come to him by descent or devise in fee. Before this Act the Court had no authority to sell the real estate of an infant upon the mere ground that a sale would be beneficial: *Calvert* v. *Godfrey*, 6 Beav. 97.

Leases and sales of infant's land generally.

It also enables the Court to authorize leases and sales of the infant's freehold and leasehold land, and it is conceived that the guardians of an infant may under this section, and ss. 46 and 49 of the S. E. A., 1877, grant leases for twenty-one years of the infant's land without the authority of the Court. As to the power of the Court to authorize leases of infant's land under 11 Geo. 4 and 1 Will. 4, c. 65, see Simpson on Infants, 334, and *Re Letchford*, 2 Ch. D. 719.

All the powers of the S. E. A., 1877, may be executed by the guardians on behalf of the infant (s. 49).

In *Re Liddell*, *Liddell* v. *Liddell*, 31 W. R. 238, W. N., 1882, 183, property was devised to the sons and daughters of a testator successively on their attaining the age of twenty-one years, and in default of any son or daughter to the testator's brother, who was of age. On the petition of the sons and daughters, two of whom were infants, asking a sale, it was held that the estate came within this section, notwithstanding the gift over.

Leases, sales, &c., of land to which an infant is in his own right absolutely entitled in possession may now be effected under S. L. A., 1882: see ss. 59, 60.

Management of land and receipt and application of income during minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

Meaning of settlement.

The word "settlement" includes all settlements by whatever instrument made, whether deed, will, writing, or Act of Parliament; this is clear from subs. 7 of this s., which refers to the instrument by which the settlement is made, and from the definition of "instrument," s. 2 (xiii.).

Applies where legal estate vested in trustees.

This section includes the case where an infant takes by descent, also where the legal estate is vested in trustees upon trust to pay the rents and profits to an infant. By s. 2 (iii.) possession includes receipt of income, and income includes rents and profits.

Mother a guardian.

The mother is now a guardian under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27).

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms

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only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

Mortgage for repairs on infant's property.

Where, subject to certain trusts, an infant is absolutely entitled to the beneficial interest in land, the legal estate being in trustees, the Court has jurisdiction to direct the raising by mortgage of money for repairs: *Jackson* v. *Talbot*, 21 Ch. D. 786.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

Payment of income to parent or guardian.

The power in this subs. and in s. 43 (i.) to pay income to the parent or guardian for the infant's maintenance, education, or benefit, necessarily implies a power for the parent or guardian to give receipts, and exempts a person paying from seeing to the application of the money, just as a like power to trustees is necessarily implied where they are directed to sell land and divide the proceeds amongst infants (*Sowarsby* v. *Lacy*, 4 Mad. 142; *Lavender* v. *Stanton*, 6 Mad. 46). Where the father is living the amount to be allowed for maintenance is in the discretion of the trustees: *Wilson* v. *Turner*, 22 Ch. D. 521; *Re Lofthouse*, 29 *ib.* 932. But a trustee who is also one of two guardians cannot discharge himself from his duty as guardian by payment of the income to his co-guardian; strict voucher of items is not required, but a proper sum will be allowed: *Re Evans, Welch* v. *Channell*, 26 Ch. D. 58, 63.

Maintenance while father alive.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting

income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

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How far this s. agrees with the usual form.

This s. goes somewhat beyond what can be done by deed. The trust extends over the minority of a tenant in tail by descent, as well as the minority of a tenant in tail by purchase, which in a deed or will would be a void trust (see 1 Jarman, 274, 4th ed.). To this there is practically no objection, as the same accumulation would take place by operation of law or under the direction of the Court in an administration action. Under subs. 5 the trust for disposal of the proceeds of accumulation is strictly confined within what could be done by deed or will.

Application by trustees of income of property of infant for maintenance, &c.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

Does not apply where vesting is after 21.

This s. does not apply to property the vesting of which is or may be postponed beyond the age of twenty-one years: *Judkin's Trusts*, 25 Ch. D. 743. In all such cases where the vesting is so postponed, maintenance, education, and accumulation clauses are still necessary.

As to the implied power of the parent or guardian to give receipts for income and as to the allowance for maintenance where the father is living, see n. to s. 42 (4); and as to controlling the discretion of a trustee in regard to maintenance and education as long as the discretion is honestly exercised, see *Re Lofthouse*, 29 Ch. D. 921.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

* Under this and the preceding subs. trustees may apply past accumulations in payment of past maintenance: *Re Pitts' Settlement, Collins* v. *Pitts*, W. N., 1884, 225. But see S. C. *ib.* 242.

* Past maintenance.

Accumulations of income of property vested, but subject to be divested on death, under twenty-one, have been held to be part of the infant's estate on his dying under that age: *Re Buckley's Estate*, 22 Ch. D. 583 (decided on s. 26 of 23 & 24 Vict. c. 145, the latter clause of which is the same as in this subs.). This, however, seems directly contrary to the wording of the section, which expressly gives the accumulations to the person who ultimately becomes entitled to the capital, and puts the income of a contingent fund (where it produces income) and of a vested fund on the same footing.

Fund vested subject to be divested.

For investments of trust money authorized by law, see pp. 176–179 *infra*.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"Contrary intention."

A direction to accumulate the income of shares given to infants contingently on attaining twenty-one, and to pay the same to them as and when their presumptive shares become payable, is not a contrary intention excluding the operation of this section: *Re Thatcher's Trusts*, 26 Ch. D. 426.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

Applies to cases only where income goes with capital.

Under s. 26 of Lord Cranworth's Act, the expression income to which such infant "may be entitled" was held to mean "may be or become entitled," so as to include income accruing on a fund to which an infant was contingently entitled (*Re Cotton*, 1 Ch. D. 232), but where no income was accruing before the contingency the s. did not apply (*Re George*, 5 Ch. D. 837). The same holds good under this s. of this Act: *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Dickson, Hill* v. *Grant*, 28 Ch. D. 291, 29 *ib.* 334. But if the legacy is directed to be set apart the income may be applied under this s.: *Johnston* v. *O'Neill*, 3 L. R. Ir. 476; *Re Medlock's Trusts, Ruffle* v. *Medlock*, 55 L. J. Ch. 738, W. N. 1886, 111. Nor does this s. apply where the whole income is subject to a prior express trust for accumulation: *Re Alford, Hunt* v. *Parry*, 32 Ch. D. 383.

In the case of a pecuniary legacy to an infant contingent on his attaining twenty-one, and carrying interest in the meantime, the executors are bound to set it apart, and would but for this s. accumulate the whole income. The effect of this s. is that, in the absence of any

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direction to the contrary, if the infant dies under twenty-one the residuary legatee takes only the accumulations representing the residue of the income not applied under it. On the other hand, if no interest is payable on the legacy till the infant attains twenty-one, there is no income to which the s. can apply, and the residuary legatee takes the income of the residue without deduction till the legacy becomes vested. The short effect of the s. seems capable of being stated thus: Where the income will go along with the capital if and when the capital vests, then the income is applicable under the s. for the benefit of the infant, otherwise not.

Difference between ss. 42 and 43.

S. 42 authorizes the application of the rents and profits of land as defined by s. 2 (ii.) for the maintenance, education, or benefit of an infant only where the instrument under which the interest of the infant arises comes into operation after 1881, but s. 43 applies to any property as defined by s. 2 (i.), whether the instrument comes into operation after 1881 or not.

X.—RENTCHARGES AND OTHER ANNUAL SUMS.

RENTCHARGES AND OTHER ANNUAL SUMS.

Remedies for recovery of annual sums charged on land.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly, or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof

is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

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RENTCHARGES AND OTHER ANNUAL SUMS.

How agrees with usual form.

Why a term is necessary.

This s. gives the ordinary remedy for enforcing payment of a rentcharge, except that instead of a term, power only is given to limit a term. The remedy by means of a term is rarely wanted, and if wanted the term can be created. Where by reason of a lease being prior in date to the limitation of a rentcharge, or being granted under a power which gives it priority to a rentcharge, the lessee's title is paramount to the rentcharge, the remedy by distress is not available, the lessee being only liable to pay his rent to the reversioner. Hence the necessity for a term.

Redemption of quit-rents and other perpetual charges.

45.—(1.) Where there is a quit-rent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland. SS. 45, 46, 47.

The Copyhold Commissioners are now called the Land Commissioners for England: S. L. A., 1882 (45 & 46 Vict. c. 38, s. 48). RENTCHARGES AND OTHER ANNUAL SUMS.

This s. applies only where there is a person seised in fee simple of the rent, or able (as in case of trustees with a power of sale) to give a discharge for the purchase-money, or (as in case of a tenant for life) to procure under S. L. A., 1882, such a discharge.

The rents referred to in this s., except a perpetual rentcharge or annuity, are incidents of tenure, and would not be incumbrances within s. 5.

The entire expense of redeeming the rent necessarily falls on the person redeeming. He has to procure the certificate of the Land Commissioners as to the amount to be paid, and as to payment or tender of that amount. The person entitled to the rent has only to receive the redemption money. On whom expense falls.

As to obtaining apportionment of rents mentioned in this s., see 17 & 18 Vict. c. 97, ss. 10–14. Apportionment.

XI.—POWERS OF ATTORNEY.

POWERS OF ATTORNEY.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. Execution under power of attorney.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

This s. had especial reference to clauses which were struck out of the Bill in the House of Commons, but which are now contained in the C. A., 1882, ss. 8 and 9.

The execution after 1881 of an instrument by an attorney in his own name will not be invalid. It is not necessary, though proper, to express that he executes as attorney, or on behalf of his principal.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the Payment by attorney under power without notice of death, &c., good.

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POWERS OF ATTORNEY.

power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation, was not at the time of the payment or act known to the person making or doing the same.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

This s. is supplementary to 22 & 23 Vict. c. 35, s. 26, which applied only to trustees, executors, and administrators.

Further provision is made for powers of attorney by ss. 8 and 9 of the C. A., 1882. It is still necessary for a purchaser taking a conveyance under power of attorney not made in accordance with that Act, to ascertain that the principal is alive at the time of execution of the conveyance. But this s. seems to enable the attorney to give a valid discharge for the purchase-money, so that where the contract is binding on the vendor, the purchaser would obtain a good equitable title. The legal estate would remain outstanding, but a conveyance could be obtained from the personal representatives under s. 4 or s. 30 of this Act. Notwithstanding this s., it will be best still to continue the old practice of depositing or retaining the purchase-money until it is ascertained that the vendor survived the date of execution by his attorney, unless the power can be and is made absolutely irrevocable under s. 8 of C. A., 1882, or made irrevocable for a specified period under s. 9 of that Act, and in the latter case the execution by the attorney must be within the specified period.

As to completing purchase under power of attorney under this s.

Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked

as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein.

See Rule under this s., p. 147.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

There is always a difficulty in securing the production of a general power of attorney for the benefit of those whose rights depend on an exercise of the power, the original document being necessarily retained for subsequent use. Under this s. the original may be deposited, and may be inspected and an office copy may be obtained.

XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

49.—(1.) It is hereby declared that the use of the word "grant" is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

Use of word "grant" unnecessary.

(2.) This section applies to conveyances made before or after the commencement of this Act.

Since the Act 8 & 9 Vict. c. 106, s. 2, enabled land in possession to be conveyed by grant, it has been the practice to use that word in conveyances of freehold land, though probably not necessary, if the intent to pass the estate is clear (see *Chester* v. *Willan*, 2 Wms. Saund. 96a (1); *Shove* v. *Pincke*, 5 T. R. 124). This s. removes any question as to the necessity of so doing. The word "convey" may be used where convenient as to both freeholds and leaseholds (see s. 2 (v.), s. 57, and Forms in Fourth Schedule of this Act). It is not necessary to use the word "grant" except where it implies covenants under Acts of Parliament, as under s. 32 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

As to necessity for word "grant."

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CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

Conveyance by a person to himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this Act.

How land to be conveyed to tenants in common.

The first part of this s. is supplementary to 22 & 23 Vict. c. 35, s. 21 (which applies only to personal property), and is only intended to apply to a conveyance in joint tenancy, as in the ordinary case of the appointment of a new trustee. If land conveyed by A. is to be held in common by himself and B., the proper course is either for A. to convey an undivided share to B., or to convey the entirety to B. to the use of himself and B. as tenants in common. The latter form would be adopted only to make covenants run with the land.

Singular includes plural and masculine feminine.

It will be borne in mind in reading this and other sections of the Act that the singular includes the plural, the plural the singular, and the masculine gender includes the feminine, unless the contrary is expressly provided: 13 & 14 Vict. c. 21, s. 4.

Words of limitation in fee or in tail.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

See this s. illustrated in the 4th Schedule, Form IV.

Short expression for estate tail, &c.

The principal effect of this s. is to shorten the expressions required in a deed to create estates tail and cross remainders. There still remains the distinction between deeds and wills that in a will many expressions, such as "A. and his assigns for ever," "A. and his issue," &c., will create an estate of inheritance, but in a deed no words are sufficient except either the old technical words or the words authorized by this s.

Surrender of copyholds to be expressed as heretofore.

This s. applies only to deeds, therefore a surrender of copyholds should be made in the same terms according to the custom as before the Act.

There seems to be no ground for the doubt expressed in Coppinger and Munro on Rents (pp. 45, 46) that this s. does not apply to a rentcharge. The construction of words creating a use has always been the same as that of words creating a common law estate, and there can be an estate in a rentcharge. The word "estate" is used in this way in s. 5 of the Statute of Uses (27 Hen. 8, c. 10) in reference to a rentcharge created by way of use. Sect. 51 of this Act allows a new mode of describing legally the quantum of estate, and applies to an interest newly created as well as pre-existing. If not, the s. would be nugatory as regards an estate tail which, like a rentcharge, is always newly created. Sect. 5 of the Statute of Uses does not expressly authorize the execution of the use in a rentcharge for an estate tail, but nobody has ever doubted that it does. The recital (see words "special time," which cover the present case) and the enactment are quite general.

This s. applies to a rentcharge.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power.

Powers simply collateral.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

This s. removes the difficulty which arose from the indestructibility of powers simply collateral, that is powers given to a person, not taking any estate, to dispose of or charge the estate in favour of some other person (see Sug. Powers, 49, 8th ed.). But a power coupled with a duty cannot be released: *Re Eyre, Eyre* v. *Eyre*, 49 L. T. 259, W. N. 1883, 153.

Power coupled with a duty.

A married woman must acknowledge the deed of release in cases where acknowledgment is necessary to constitute a deed (Sug. Powers, 92, 8th ed.; see also *Chorlton* v. *Lings*, L. R. 4 C. P. 374; *Reg.* v. *Harrald*, L. R. 7 Q. B. 361), that is to say, unless she was married after 1882, or unless, if married earlier, her interest accrued after that year (M. W. P. A., 1882, ss. 2 and 5).

When release must be acknowledged.

As to disclaimer of powers, see C. A., 1882, s. 6.

Disclaimer of powers.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

Construction of supplemental deed.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

The enactment in this s., though not necessary, seemed required to introduce the practice of using, instead of an indorsed deed, a separate

Practical use of this s. 53.

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deed in a similar form referring to but not reciting the previous deed. The reference to the previous deed need only be such as clearly to identify it. For this purpose the date and the parties, with some explanation of the nature of the principal deed in order to make the supplemental deed intelligible, will be sufficient (see 4th Schedule, Form II.). If deeds be made up bookwise in a form now common, the supplemental deed can be attached after execution, and both together will be easily readable. A further charge cannot as a general rule be made by indorsement on the mortgage deed, which the mortgagee will not allow out of his possession, but a supplemental deed of further charge can be sent to the mortgagor for execution, and afterwards annexed by the mortgagee to his mortgage deed, without letting the latter go out of his possession.

Any document may be supplemental.

This s. only speaks of a deed supplemental to another deed, but any document may also be made supplemental to a deed or will or to any other document.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

Effect of receipt in body of deed.

This and the preceding s. make the receipt in the body of a deed executed after 1881, sufficient evidence of payment. Formerly that receipt was in equity little more than a mere form: see *Kennedy* v. *Green*, 3 My. & K. 699, 716; *Greenslade* v. *Dare*, 20 Beav. 284, 292.

Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by

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the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

This s. meets the dictum of L.J. Turner in *Viney* v. *Chaplin*, 2 De G. & J. 468, 482, making an additional document necessary where the purchase-money was to be paid to the vendor's solicitor, namely an express authority to pay to him: see also *Ex parte Swinbanks*, 11 Ch. D. 525.

Practice not altered.

It makes no alteration in the mode of procedure on the completion of a purchase, but only gives an additional security to a purchaser. The absence of a written authority to a solicitor to receive consideration money was never relied on in practice as preventing payment. Each person entitled to receive acted as if the execution by him of the deed and indorsed receipt enabled the producer of the deed so executed to receive without further authority. This was supposed to be the law before *Viney* v. *Chaplin*, and is now the law in reality. In practice it is perfectly well known to all parties who is the solicitor acting for each person and entitled to receive; the payment will be made to him, and a purchaser knowingly making payment to the wrong person would not be absolved by this section. If any one of several persons entitled to receive chooses not to let the deed out of his possession, when executed by him, his only course is to attend on completion.

Sections 54 and 55 render unnecessary the indorsed receipt and the separate authority to pay, and prevent the difficulty and delay sometimes caused by the omission to sign an indorsed receipt. The one receipt now required may be either in the body of the deed or indorsed.

In case of large purchases payment of the deposit by cheque is a reasonable practice though the vendor sells in a fiduciary character: *Farrer* v. *Lacy*, 25 Ch. D. 636, 31 *ib.* 42.

Where trustees are vendors.

This s. has now been extended to the case of trustees who are vendors (see the Trustee Act, 1888, *infra*, s. 2 (1)), and who were held not to be within it unless they had power to authorize payment to their solicitor: *Re Bellamy & Metropolitan B. of W.*, 24 Ch. D. 387; *Re Flower and the same*, 27 *ib.* 592.

Solicitor must act for person receiving.

The solicitor producing the deed must be acting for the person signing the receipt therein, and must produce the deed and not merely

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have it in his possession: *Day* v. *Woolwich, &c., Society*, 40 Ch. D. 491.

Where trustees are dividing trust funds and paying to the beneficiaries their shares, it seems doubtful whether this s. authorizes payment of a share to a solicitor producing a deed of release. The trustees are bound to pay, and the payment can scarcely be taken as the consideration for the release which is consequent on due payment being or having been already made.

Whether s. applies to release.

Sufficiency of forms in Fourth Schedule.

57.—Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.

The forms referred to are not in any way directory. They are merely illustrative of the modes in which the Act may be applied in practice.

Covenants to bind heirs, &c.

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this Act.

Benefit of real covenants.

This s. renders unnecessary the mention of "heirs and assigns," or "executors, administrators, and assigns," of the covenantee for the purpose of making the benefit of a covenant run with the land, but it does not make a covenant so run where it would not so run if the "heirs and assigns," or "executors, administrators, and assigns" were expressed.

In the case of a lease s. 10 annexes to the reversion the *benefit* of all the *lessee's* covenants, and so gives this benefit to "assigns" though not mentioned, and also though the covenant be not entered into with the reversioner, as where the lessor has a mere power; and s. 11 annexes the *obligation* of a *lessor's* covenant to the reversionary estate, and so binds assigns though not mentioned where the lessor has power to bind that estate. In all other cases the obligation of a covenant relating to land is carried no further than before the Act, and to bind the "assigns" they must still be mentioned where mention was neces-

Cases where "assigns" must be mentioned.

sary before the Act, for instance, in a lease where the covenant concerns a thing not *in esse* at the time of the demise, as to build a wall (*Spencer's Case*, 1 Smith L. C. 66, 9th ed., Woodfall L. & T. 165, 13th ed.). In cases other than those between landlord and tenant it is doubtful whether the obligation of any covenant not involving a grant runs with the land at law, independently of the Judicature Act, 1873 (36 & 37 Vict. c. 66, ss. 24, 25 (11); see *Austerberry* v. *Oldham*, 29 Ch. D. 750); but it does run in equity with notice, where the intention is clear that the assigns should be bound (*Tulk* v. *Moxhay*, 2 Ph. 774, where the assigns were mentioned; *Wilson* v. *Hart*, L. R. 1 Ch. Ap. 463, where the assigns were not mentioned), and where the covenant is merely restrictive of the user of land, and can be enforced by injunction and imposes no pecuniary obligation (*Haywood* v. *Brunswick Build. Soc.*, 8 Q. B. D. 403, 408; *London & S. W. Railway Co.* v. *Gomm*, 20 Ch. D. 563; *Austerberry* v. *Oldham*, 29 Ch. D. 750), except where it imposes an unreasonable burden on land, as in *Keppell* v. *Bailey*, 2 My. & K. 517, 535. The result seems to be that all covenants, where the burden is intended to run with the land, should be made by the covenantor for himself and his assigns.

Covenants not between landlord and tenant where assigns have notice.

Burden of real covenants.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate of the person making the same, as if heirs were expressed.

Covenants to extend to heirs, &c.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Though by the Act 32 & 33 Vict. c. 46, specialty debts binding the heirs rank no higher in the administration of assets than other debts against the land, there is still, under 11 Geo. 4 & 1 Will. 4, c. 47, ss. 6 and 8, the power to sue the heir or devisee personally for such debts, and obtain judgment against him to the extent of the assets which have devolved on him. Accordingly a creditor having so obtained judgment takes priority of other creditors against the land, and recovers without any necessity for probate or letters of administration,

Priority of judgment creditor.

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which are only required to support proceedings in an administration action. All covenants will now bind the heir or devisee so as to enable an action to be brought against him personally, though the heir is not expressly mentioned. It has always been unnecessary expressly to mention executors or administrators.

Effect of covenant with two or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of ss. 58–60.

This s. must be read in connection with ss. 58 and 59. The effect of the three last preceding sections taken together is that every covenant may now be made in the simple form: "A. hereby covenants with B. that," &c.; or "A. hereby covenants with B. and C. that," &c., except covenants relating to land the burden of which is intended to run with the land, and in such covenants, for the reasons given in the note to s. 58, A. should covenant for himself and his assigns. The covenant will thus bind the heirs, and where relating to land of any tenure the benefit of it will run with the land as if the old full form applicable to the case had been used; but where the burden is intended to run with the land the assigns of the covenantor and the land to be burdened should be mentioned. Further it will be sufficient as regards the acts to be done under the covenant, to say "that A. will pay to B," or "that A. will at the request of B. do all such acts," &c.; "that A. will pay to B. and C.," or "that A. will at the request of B. and C. do all such acts," &c. Under covenants in this form the heirs or assigns of B. (in case, for instance, of a covenant to pay rent of freehold land to B. the lessor), or the executors or administrators of B. (as in case of a

mortgage debt payable to B.) will stand precisely in the place of B. Also the survivor of B. and C., or the heirs or assigns, or the executors, administrators, or assigns of such survivor, as the case may be, will stand precisely in the place of B. and C. as if the old full form of covenant had been used. Thus not only are all covenants greatly shortened, but the form of a covenant with several persons is reduced to that of a covenant with one person. The same principle applies to any contract under seal, as, for instance, the proviso for redemption or the proviso for reduction of the rate of interest on a mortgage, and to contracts in a marriage settlement.

Effect of advance on joint account, &c.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

The ordinary joint account clause had two objects: (1) To rebut the presumption in equity that the money was advanced in equal shares, and to convert it into a joint advance; (2) The advance being originally joint, to enable the money, after the death of one of the persons

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making the advance, to be paid to the survivors or the survivor, or his representatives, without inquiry whether the joint account had been severed, the clause operating in fact as a contract that a severance (if any) should not affect the right of the survivor to give a receipt. Both these objects are effected by the present s. The s. applies either where the advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares, so that an expression of the joint account is not necessary, though it is convenient as a direct statement of the rights of the mortgagees. As between the mortgagees the joint account may be rebutted by evidence: *Re Jackson, Smith* v. *Sibthorpe*, 34 Ch. D. 732.

Grant of easements, &c., by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

The Statute of Uses, 27 Hen. VIII. c. 10, s. 1 (by force, as it seems, of the words, "of and in such like estates"), enabled *estates* only to be raised by way of use, and s. 5 enabled rentcharges to be raised by way of use. The statute does not contain any s. applicable to the creation of other interests *de novo* (see *Beaudely* v. *Brook*, Cro. Jac. 189; Bac. Ab. Uses, F.), but s. 1 enabled them, when created for a freehold interest, to be conveyed to uses, as being hereditaments. Consequently under a conveyance to uses or under a power of sale and exchange, a right of way or other easement or liberty could not be created, but if in existence could be conveyed to uses.

No new easement can be created.

"Deriving title" means by and according to law, consequently this s. does not confer any new power of transmitting title, nor enable the creation of any new kind of easement, or make assignable that which before this Act was not by law assignable. For instance, a right of way in gross cannot be created capable of assignment: see *Ackroyd* v. *Smith*, 10 C. B. 164. That there may be an "estate" in an incorporeal hereditament appears by the Statute of Uses, s. 5, which speaks of an estate in an annual rent.

Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title,

interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same. SS. 63, 64, 65. CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

The object of this s. is to abolish the "all estate" clause. The s. does not say that every conveyance shall be deemed to contain this clause, which might be inconsistent with the terms of conveyance, as the word "conveyance" includes "lease" (see s. 2 (v.)). It merely confirms a previously existing rule of law, and applies the rule in the same cases, namely, where a contrary intention is not expressed. Even with an express "all estate" clause a lease could not pass the fee for want of the word "heirs" or "fee simple," and also because the premises would be controlled by the habendum: Co. Lit. 183 a; *Buckler's Case*, 2 Co. 55; Shep. Touch. 113. "All estate" clause.

64.—In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require. Construction of implied covenants.

XIII.—LONG TERMS. LONG TERMS.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having Enlargement of residue of long term into fee simple.

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no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

Presumption of release of a rent.

The Statute of Limitations, 3 & 4 Will. 4, c. 27, does not apply to rent reserved on a lease (*Grant* v. *Ellis*, 9 M. & W. 113; Sugden, Real Prop. Stat. 36, 63, 2nd ed.), but before that Act presumption from lapse of time operated as a bar in cases where the old Act did not apply (*Doe* v. *Prosser*, Cowper, 217); and it is conceived that the same principle would hold now, so that after non-payment of rent for a long period it would be presumed to have been released: see *Eldridge* v. *Knott*, Cowper, 214.

"No money value."

A rent which, when received, has a money value as a rent of three shillings, though it be not regularly paid, is not within this subs.: *Re Smith & Stott*, 29 Ch. D. 1009 n.; otherwise as to a rent of one silver penny if lawfully demanded: *Re Chapman & Hobbs*, *ib.* 1007.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

If the married woman was married after 1882, or if her beneficial interest in the term was acquired after 1882, she holds it as her separate property, whether so expressed or not, under the M. W. P. A. 1882, ss. 2 and 5, and her husband's concurrence is not necessary.

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any

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such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

S. applies to cases where reversion has no appreciable value.

This s. enables the conversion into fee simple of a long term in a case where it is practically impossible that evidence of title to the reversion in fee could exist at the expiration of the term, at least where the reversion is not vested in a corporation, and where also if such evidence did exist the value of the reversion must be infinitesimally small at the time of conversion.

Old mode of acquiring fee.

Before the Act 8 & 9 Vict. c. 106, a tortious fee, and for all practical purposes an actual fee, could be acquired by means of a feoffment: see 1 Sand. Uses, 30, 5th ed.; 2 *ib.* 14 *et seq.* But s. 4 of that Act took away the tortious effect of a feoffment, and rendered impossible the acquisition of a fee in place of a term. The usual origin of a long term is a mortgage by demise where the right of redemption has been foreclosed or has been barred by possession and lapse of time. The fact that the land is not freehold is often overlooked, complication of title arises, and the intentions of a testator are sometimes frustrated, the leasehold interest passing under a gift not intended to include it.

Who has power to convert.

The power to convert into a fee is given to "any person beneficially entitled" "to possession" (see definition of "possession," s. 2 (iii.)). Thus a tenant for life, legal or equitable, and whether the land is "subject to any incumbrance or not," can effect the conversion.

Trustee.

A trustee can only convert where the trust is active and he is in receipt of rent. Otherwise the beneficial owner is the person to convert. Thus a trustee under the usual trust for sale and conversion in a will would be the proper person to effect a conversion, but not the trustee under a settlement holding the term on trusts corresponding to the limitation of the freeholds. There the equitable tenant for life would be the proper person.

Mortgagor but not mortgagee.

A mortgagee cannot convert, as it would be improper to allow him to change the nature of his mortgagor's estate. But the mortgagor can convert, the conversion being no injury to the mortgagee.

Effect of conversion.

The effect of subs. 3 is to defeat the reversion in fee in the same way as on a disentail, so that the fee acquired by conversion is free from all dealings affecting the original fee.

The term capable of being enlarged by this Act has been explained by the C. A., 1882, s. 11, which enacts that

C. A., 1882, s. 11.

Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always

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Amendment of enactment respecting long terms.

applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

It follows that if A. having a lease for 999 years at a substantial rent demised to B. for 500 years without rent, taking a fine, then neither A. under s. 65 of the Act of 1881, nor B. under s. 11 of the Act of 1882 could acquire the fee. The result would be the same if the lease for 999 years be not at a rent, but be liable to be determined by re-entry for condition broken. But if neither the lease nor the sub-lease be at a rent, nor be liable to be determined by re-entry for condition broken, then B. could acquire the fee, notwithstanding that his immediate reversion is not the freehold, and could thus defeat A.'s term. A. could also acquire the fee as being entitled to possession (which includes receipt of rents and profits (if any), s. 2 (iii.)) in right of his term (see s. 65 (2) (i.)), but having done so would be liable to have his estate defeated by the enlargement of B.'s term.

C. A., 1881, s. 65 continued.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be and shall be conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so

conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

Where no dealing tenure is changed;

Under subs. 5, where there has been no dealing for value with the ultimate beneficial interest in the term, and that interest has not become absolutely and indefeasibly vested (as where the term has been settled in the usual way, and no tenant in tail by purchase has attained twenty-one), the land on the enlargement of the term is for all purposes of descent, devise, &c., changed from leasehold to fee simple. It will no longer vest absolutely in the first tenant in tail who attains twenty-one, but will descend under the entail if not disentailed. This result is the same as that produced where leaseholds are sold under a power of sale and the proceeds invested in fee simple land.

contra where a conveyance for value.

Where there has been a conveyance for value the effect of that conveyance is preserved. Thus suppose the settlement to be on A. for life, remainder to his sons successively in tail, remainder to C. in tail, remainder to D. in fee, A. has no son of age, the term has not become absolutely and indefeasibly vested in any person, therefore the estate in fee simple acquired by enlargement should be conveyed to the uses of the settlement, and in the meantime will devolve accordingly as to the equitable interest. But C. will become absolutely entitled to the term in case A. dies without having a son who attains the age of twenty-one, or dies under that age without leaving issue inheritable; and if C. has mortgaged this contingent interest, then the mortgagee will take the fee obtained by enlargement in the same event in which he would have taken the term, but the equity of redemption will devolve under the entail. If a son of A. attains twenty-one before the enlargement is effected, then he becomes absolutely and indefeasibly entitled to the term, and this subs. 5 does not apply, but under subs. 4 the fee acquired is subject to the same trusts as the term, that is, a trust for the son absolutely, and no disentail is required. Under a will the land will pass as freehold or leasehold, according to its tenure at the time of the testator's death.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

Saves the right to mines not vested in surface owner.

Subs. 6 in effect gives to the owner of a fee simple obtained by enlargement the right to the mines in fee simple as well as the land, except in those cases where there is a possibility that the mines can be shown to be vested in some other person than the reversioner in fee.

SS. 65, 66. LONG TERMS.

Mines severed in right (as by conveyance separately from the land) will also be severed in fact, but the words "in fact" seem also required to save the title of a person in possession of mines without obliging him to show that they have been severed in right.

ADOPTION OF ACT.

XIV.—ADOPTION OF ACT.

Protection of solicitor and trustees adopting Act.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor they shall also be protected in like manner.

Solicitor's responsibility in reference to adoption of the Act.

Under this s. a solicitor adopting the Act and framing his drafts so as to incorporate the forms contained in the Act, or so as not to exclude any provisions of the Act, incurs no responsibility, those forms and provisions being by this section declared proper. The same

holds as to a trustee or executor. If he uses other forms his responsibility remains the same as before the Act.

ADOPTION OF ACT.

Having regard to subs. 3, trustees and executors will probably always require the Act to be adopted, thereby obtaining express statutory protection.

Adoption by trustees.

XV.—MISCELLANEOUS.

MISCELLANEOUS.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing.

Regulations respecting notice.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation without his name, or generally to the persons interested without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the Court.

As to service on mortgagor of notice to sell by mortgagee, see note to s. 20 (i.).

Service on mortgagor.

SS. 68, 69.

MISCELLANEOUS.

Short title of 5 & 6 Will. 4, c. 62.

68.—The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament.

The object of this s. is to render unnecessary the long and cumbrous title of the Act referred to. The Form given in the schedule to that Act will now run thus: I, A. B., do solemnly . . . . and by virtue of the provisions of the Statutory Declarations Act, 1835.

COURT; PROCEDURE; ORDERS.

XVI.—COURT; PROCEDURE; ORDERS.

Regulations respecting payments into Court and application.

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

This subs. is obligatory: *Re Lillwall's Trusts*, 30 W. R. 243, W. N. 1882, 6; *Patching* v. *Bull*, 30 W. R. 244, affirmed W. N. 1882, 113.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.

39 & 40 Vict. c. 59, s. 17.

(9.) The powers of the Court may, as regards land in

the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10.) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Orders of Court conclusive.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

Applies to orders of the old Courts.

"Court" is defined s. 2 (xviii.) as "Her Majesty's High Court of Justice," which is a division of the Supreme Court which includes the old Courts of Chancery and Common Law (Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 3, 4), all united into one Court, so that this s. applies to all orders of the old Courts.

40 & 41 Vict. c. 18, s. 40.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

What matters covered by this section.

This s. has an important effect in making valid titles under sales by the Court. The order for sale is made conclusive in favour of a purchaser as to jurisdiction (for instance to sell part of a settled estate

SS. 70, 71.
COURT; PROCEDURE; ORDERS.

for any purpose) and as to consent (as of a respondent in a petition under the Settled Estates Act), notice or service (as where a party to an action or a person served with notice of judgment in an action does not appear). It is also conclusive in favour of a purchaser as to dispensing with the concurrence or consent of persons entitled, whether the objection to the order appears on the face of it or not: *Hall-Dare's Contract*, 21 Ch. D. 41. This case appears to decide that every order of the right Court is valid in favour of a purchaser, *ib.* 47. "Purchaser" in this Act includes a lessee or mortgagee: s. 2 (viii.).

How far retrospective.

Subss. 2 and 3 give this section an important retrospective effect by making valid every past lease or sale under the Settled Estates Acts of 1856 and 1877, where no proceedings have been taken to question the sale, notwithstanding that there has been in fact an omission to obtain the required consent under s. 28 of the first Act, or s. 40 of the second Act.

XVII.—REPEALS.

REPEALS.

Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

71.—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

Powers under Lord Cranworth's Act preserved.

Subs. 2 preserves to the full extent the power of sale given by Lord Cranworth's Act in case of mortgages prior to 1882. The "operation and effect" of the mortgage was under that Act to give every mortgagee a power of sale unless otherwise agreed, and as a "consequence" he could sell. This "operation, effect and consequence" are not to be affected by the repeal of the Act (see *Solomon & Meagher's Contract*, 40 Ch. D. 508).

As to the effect of the repeals in this s., see *Quilter* v. *Mapleson*, 9 Q. B. D. 675, 677; *Re Dickson, Hill* v. *Grant*, 29 Ch. D. 340.

XVIII.—Ireland.

Ireland.

Modifications respecting Ireland.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

40 & 41 Vict. c. 57, s. 69.

Death of bare trustee (*a*) intestate, &c. 37 & 38 Vict. c. 78.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

(*a*) As to the meaning of a "bare trustee," see note to V. & P. A. s. 5, p. 10.

SCHEDULES.

THE FIRST SCHEDULE.

ACTS AFFECTED (*a*).

PART I.

1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, lis pendens, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of lis pendens, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

(*a*) The Acts in Part I. of this schedule were affected only by sects. of the Bill struck out in the House of Commons, and the reference to them here should also have been struck out. (See Preface to the first edition.) But those sects. are now included in s. 2 of the C. A., 1882.

PART II.

5 & 6 Will. 4, c. 62.—An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual abolition of oaths and affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end of the portion comprised in the description or citation.

PART I.

22 & 23 Vict. c. 35, in part.	An Act to further amend the law of property and to relieve trustees . . . . . Sections four to nine.	in part; namely,—
23 & 24 Vict. c. 126, in part.	The Common Law Procedure Act, 1860 . . . . . Section two.	in part; namely,—

PART II.

15 & 16 Vict. c. 86, in part.	An Act to amend the practice and course of proceedings in the High Court of Chancery. Section forty-eight.	in part; namely,—

PART III.

8 & 9 Vict. c. 119.	An Act to facilitate the conveyance of real property.

23 & 24 Vict. c. 145, in part.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills . . . . Parts II. and III. (sections eleven to thirty) (*a*).	in part; namely,—

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I.

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

PART II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of

(*a*) Parts I. and IV. of the Act here referred to have since been repealed by the S. L. A., 1882, s. 64, but the powers given by ss. 8 & 9 included in Part I. of that Act are now supplied by the Trustee Act, 1888, ss. 10 and 11.

the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of

which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid * *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of† the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or, in case of further advance, after* aforesaid *at* * *insert* and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together]

** *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

** *Variations as noted above.*

THE FOURTH SCHEDULE.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the person claiming under him AND *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the

sum of and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] and *C.* of [*&c.*] of the second part and *M.* of [*&c.*] of the third part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add, if required,* And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto

and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*] of the second part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the third part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S. John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable,* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple. [*Insert trusts of term of* 500 *years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition* (*a*), *and other powers and provisions, if and as desired*].

In witness &c.

(*a*) Powers of sale, exchange, partition, enfranchisement and leasing are now supplied by the S. L. A., 1882, and should be omitted.

S. 1.

CHAPTER IV.

THE CONVEYANCING ACT, 1882.

45 & 46 VICT. c. 39.

An Act for further improving the Practice of Conveyancing; and for other Purposes. [10 August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Preliminary.

Short titles; commencement; extent; interpretation. 44 & 45 Vict. c. 41.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881) and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

What sections retrospective.

Ss. 3–6, and s. 7, subs. 3, and s. 11 are retrospective, except in case of s. 3 as to pending actions.

(3.) This Act does not extend to Scotland.

(4.) In this Act and in the Schedule thereto—

(i.) Property includes real and personal property, and any debt, and anything in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or

other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of Fines and "Recoveries, and for the substitution of more "simple modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for "the abolition of Fines and Recoveries, and "for the substitution of more simple modes of "Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

3 & 4 Will. 4, c. 74.

4 & 5 Will. 4, c. 92.

Searches.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

Official negative and other certificates of searches for judgments, Crown debts, &c.

In respect to deeds this s. applies to those of which *entries* only are made, as, for instance, a deed creating a rentcharge; it does not apply to deeds *enrolled* under any Act or statutory rule (see subs. 11 and note). A search would not usually be made for deeds so enrolled. But search for disentailing deeds may in some cases be necessary: see pp. 164–167 for searches generally.

Search not usual for enrolled deeds.

For rules relating to the Central Office, see R. S. C. 1883, Or. lxi., and as to searches, *ib.*, r. 23.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

S. 2.
Searches.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

See definition of purchaser, s. 1 (4), (ii.).

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59.

44 & 45 Vict. c. 68.

See the rules under this s. next chapter, p. 146.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office;

and every such search may be made as if this section or any such Rule had not been enacted or made. SS. 2, 3.

Searches.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule. 3 & 4 Will. 4, c. 74.

(12.) This section does not extend to Ireland.

Notice.

Notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless— Restriction on constructive notice.

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Subs. (ii.) prevents constructive notice under such circumstances as those in *Hargreaves* v. *Rothwell*, 1 Keen. 160, or *Re Cousins*, 31 Ch. D. 671. A purchaser cannot avoid constructive notice by omitting to investigate the title, even though the law under an open contract precludes investigation: *Patman* v. *Harland*, 17 Ch. D. 353; *Dunning* v. *E. of Gainsborough*, W. N. 1885, 110. Under subs. (ii.) there will be the same equitable remedy by injunction as before the Act.

SS. 3, 4, 5.

Notice.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

Leases.

Leases.

Contract for lease not part of title to lease.

4.—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this Act.

Effect of s. 4.

The effect of this s. is merely to prevent a purchaser of the lease after it is granted, requiring as part of his title an abstract and production of the contract under which it was granted; thus placing the contract in the same position as a document shewing the freeholder's title under V. & P. A. s. 2.

Separate Trustees.

Separate Trustees.

Appointment of separate sets of trustees.

5.—(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

Separate Trustees.

(2.) This section applies to trusts created either before or after the commencement of this Act.

This s. applies to any appointment.

Plural includes singular, so that the words "on appointment of new trustees" include an appointment of one new trustee. It has been held that the appointment need not be an appointment of trustees for the whole of the funds: *Paine's Trusts*, 28 Ch. D. 725; but the contrary was held by North, J., in a later case: *Savile* v. *Couper*, 36 Ch. D. 520. See also *Re Nesbitt's Trusts*, 19 L. R. Ir. 509. The inconvenient result is that in order to appoint separate sets of trustees all the existing trustees must retire, though some may desire to continue and be the most proper persons. But see *Moss's Trusts*, 37 Ch. D. 513, 515.

The Court has appointed separate sets of trustees for distinct trusts, on petition under the Trustee Acts (see *Cotterill's Trusts*, W. N. 1869, 183; *Cunard's Trusts*, 27 W. R. 52; *Moss's Trusts*, 37 Ch. D. 513; Lewin on Trusts, 667, 8th ed.).

It is conceived that this s. applies where a set of distinct trusts are for the time being in force as to a fund, though there may be an ultimate limitation over by reference to the trusts of some other fund: *Hatherington's Trusts*, 34 Ch. D. 211. The reference is merely to save repetition, and does not make the two funds into one, though in certain cases there will be no duplication of charges: see *Hindle* v. *Taylor*, 5 D. M. & G. 577; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258.

Powers.

Powers.

Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Disclaimer of powers.

C. A. s. 52 enables the release of a power whether coupled with an interest or not (unless it is coupled with a duty), thereby extinguishing it, so that several trustees concurring can absolutely preclude themselves from ever exercising the power, but it does not enable one trustee alone to disclaim as he could disclaim a trust estate, so as to vest the power in the other trustees. This s. puts disclaimer of a

SS. 6, 7.
Powers.

power on the same footing as disclaimer of an estate: see Sugd. Powers, 50, 8th ed.; *Re Fisher & Haslett*, 13 L. R. Ir. 546.

Married Women.

Married Women.

Acknowledgment of deeds by married women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall by virtue of this Act be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorised to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

S. 84 of the English Fines and Recoveries Act as it now stands, consequent on this repeal, will be found after the schedule to this Act. The new form of memorandum is given in R. S. C. of December, 1882, in the next chapter.

Effect of s. 7,

The effect of this s. is:

1. To substitute one perpetual or special commissioner in place of two.
2. To make a memorandum of acknowledgment indorsed on the deed sufficient, without any separate certificate to be filed.

and of M. W. P. A.

But under the M. W. P. A. every woman married after 1882, and every other married woman, as to property acquired after that year, is in the position of a *feme sole*, and can convey without any acknowledgment.

See the effect of a married woman's acknowledgment and separate examination discussed in *Tennent* v. *Welch*, 37 Ch. D. 622.

S. 7.
Married Women.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.
40 & 41 Vict. c. 57.

See under this s. R. S. C. of December, 1882, in the next chapter.

(4.) The enactments described in the Schedule to this Act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner, and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper

SS. 7, 8.

Married Women.

office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

See form of requisition for an official search for certificates of acknowledgments, R. S. C. of December, 1882, in the next chapter.

Subs. 3 applies to deeds *acknowledged* before or after 1882, and subs. 5 applies to the *execution* of deeds after 1882. So far as regards the interest of the person since the Act, or of either of the persons before the Act, taking an acknowledgment, the deed is unimpeachable, whether executed before or after 1882. But so far as regards the manner of acknowledgment, the Act applies only to deeds executed after 1882.

Certificates lodged after the commencement of the Act and referred to in subs. 6, necessarily mean the certificates of acknowledgments taken but not lodged before the Act. An index of certificates of acknowledgment has still to be kept, to enable searches in regard to deeds executed before the Act.

Powers of Attorney.

Powers of Attorney.

Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this act.

Powers of attorney given for value.

This s. relates only to powers of attorney given for value, and enables a power of that kind to take the place of an actual transfer, but it is conceived that the attorney must be a person named, and that the power lapses by his death. He may, however, be empowered to appoint substitutes. A person desiring to give a security may, in consideration of the loan, give an irrevocable power to transfer, or convey, or sell, thus enabling the lender to realise his security, if he so require. When the loan is repaid the power may be cancelled, and a transfer and re-transfer are thus avoided. The person taking the power must use all the same precautions as if he had taken an actual transfer, so as to prevent another transferee taking without notice. In the case of land, for instance, he must obtain the deeds.

Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death,

S. 9.

Powers of Attorney.

marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Power of attorney not given for value.

This s. includes powers of attorney not given for value, as, for instance, where a person going abroad desires to give a power to sell property. The main difficulty hitherto has been that in order to make a complete title it was necessary to ascertain that the principal was living when the transfer under the power was made. In order to avoid this, the only course was to make an actual transfer on trust for sale. If no sale was made, a re-transfer became necessary, thus in the case of land putting two deeds in the title. This s. is supplementary to C. A. ss. 46, 47.

Execution by attorney.

Though not necessary since the C. A. s. 46, it is usual and proper that the attorney should sign the principal's name and express the deed to be signed, sealed, and delivered by the attorney, naming him. The principal is named and described amongst the parties as if he himself executed, and no other reference is made to the attorney or the power, except in the signature and attestation clause (see as to execution by an attorney, *Coombes's Case*, 9 Co. Rep. 77; *Frontin* v. *Small*, 2 Lord Raym. 1418; *Wilks* v. *Back*, 2 East, 142; see also *Lawrie* v. *Lees*, 14 Ch. D. 249, 7 App. Cas. 19, where, though the attorneys executed in their own names, the inference was that they did so on behalf of their principal: 7 App. Cas. 28, per Lord Penzance).

Executory Limitations.

Executory Limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

Restriction on executory limitations.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

Executory limitations assimilated to strict settlement.

An executory limitation generally prevented alienation for a longer period than an ordinary strict settlement. Thus under a devise "to A. in fee simple, and if he die without issue living at his death, to B. in fee simple," with further limitations over of the same kind, it was necessary that all the persons named should concur in a sale, whereas in case of an ordinary strict settlement on the several persons named and their issue, A. with his son, when of age, can bar the entail and sell. This s. enables A. alone to sell when any child or other issue of his attains twenty-one, the limitations over becoming barred in the same event in which the entail under a strict settlement could be barred. The s. gives no estate to the issue, but simply gives A. in his lifetime, when a child or other issue of his attains twenty-one, the same complete power of disposition as independently of the Act he would acquire at his death if a child or other issue of his were then living.

The s. only applies to an estate in fee or for life, or a term of years absolute or determinable with life.

Long Terms.

Long Terms.

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior

SS. 11, 12, 13.

term, itself incapable of being enlarged into a fee simple.

Mortgages.

Mortgages.

Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

See note to C. A. s. 15.

Saving.

Saving.

Restriction on repeals in this Act.

13. The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

SCHEDULE.

REPEALS.

Section 7 (4).

3 & 4 Will. 4, c. 74. in part.	The Fines and Recoveries Act . .	in part; namely,— Section eighty-four, from and including the words "and the same judge," to the end of that section. Sections eighty-five to eighty-eight inclusive.
4 & 5 Will. 4, c. 92. in part.	The Fines and Recoveries (Ireland) Act . .	in part; namely,— Section seventy-five, from and including the words "and the same judge," to the end of that section. Sections seventy-six to seventy-nine inclusive.
17 & 18 Vict. c. 75.	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.	
41 & 42 Vict. c. 23.	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.	

Sect. 84 of the English Fines and Recoveries Act as it now stands, consequent on the above repeal, is as follows:—

LXXXIV. When a married woman shall acknewlodge any such deed as aforesaid, the Judge, Master in Chancery, or Commissioner taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect: *videlicet* [*the form to be now used is given in R. S. C. of December* 1882, p. 145].

CHAPTER V.

RULES OF THE SUPREME COURT UNDER THE FINES AND RECOVERIES ACT AND THE CONVEYANCING ACTS, 1881, 1882 (DECEMBER, 1882).

SECT. I.

Rules under the Act for the Abolition of Fines and Recoveries, and Section 7 of the Conveyancing Act, 1882.

1. No person authorised or appointed under the Act 3 & 4 Will. 4, c. 74 (in these Rules referred to as the Fines and Recoveries Act), to take the acknowledgments of deeds by married women shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a Commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the Commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the Commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the Commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot or at the back thereof.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married

woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

"This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:

"And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment."

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorized to take the acknowledgment:—

(Signed) *A. B.*

A Judge of the High Court of Justice in England,

or a Judge of the County Court of

or a perpetual Commissioner for taking acknowledgments of deeds by married women.

or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorized to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every Commission appointing a special Commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women and shall be there filed. An index shall be prepared and kept in the

said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. [*Provides for costs.*]

Sect. II.

Rules under Section 2 of the Conveyancing Act, 1882 (a).

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and certificates of the results of such searches shall

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(*a*) These rules should be read in connection with R. S. C., 1883, Order lxi. Rule 9, which provides that—

All deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice, may be enrolled in the Enrolment Department of the Central Office;

And with Rule 23 of the same Order, which provides that—

The Clerk of Enrolments and each of the following Registrars, namely—

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments,

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.

be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

Rule under the Conveyancing and Law of Property Act, 1881.

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the Office.

APPENDIX.

FORM I.

DECLARATION BY SEPARATE INSTRUMENT AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature.
Central Office.
To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

I declare that the search (*or* searches) in the name (*or* names) of required to be made by the requisition for search, dated the is (*or* are) required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

Signature,
Address, and
Description

Dated

FORM II.

DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above-mentioned search is required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

FORM III.

REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE (*a*) UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature.
Central Office.

Requisition for Search.

To the Clerk of Enrolments,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 to 18 , both inclusive, in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search }

Dated

See as to this requisition, note on Enrolled deeds, p. 166.

(*a*) *I.e.* the Enrolment Department of the Central Office: see R. S. C., 1883, Or. lxi., r. 9.

FORM IV.

REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Bills of Sale,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from 18 to 18 , both inclusive, in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search

Dated

FORM V.

REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for Certificates of Acknowledgments of Deeds by Married Women during the period from 18 to 18 , both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed, if the Search relates to a particular Deed.	County, Parish, or place in which the Property is situate, or other description of the Property.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search

Dated

FORM VI.

REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Judgments,
Royal Courts of Justice,
London.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules and lis pendens, and for judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 to 18 , both inclusive and for executions for the period from the 29th July, 1864 (*or as the case may require*) to the 18 , both inclusive, and for annuities for the period from the 26th April, 1855 (*or as the case may require*) to the 18 , both inclusive in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search

Dated

[*Note.*—This requisition does not expressly refer to a search for writs of execution on Crown debts, which is the proper search since 1st No-

vember, 1865, under 28 & 29 Vict. c. 104. That search is a general search not limited in time except by the date of commencement of the register. It is made in the same register as the search for executions on ordinary judgments (Dart, V. & P. 495, 5th ed.), and will therefore be included under the general expression "for executions." The day, 29th July, 1864, mentioned in this requisition, is the earliest day from which writs of execution on ordinary judgments are registered in the name of the judgment debtor pursuant to 27 & 28 Vict. c. 112, but no search for those writs is necessary, although the purchaser or mortgagee must see that the vendor or mortgagor is in possession at the time of completion (see next chapter for searches required by this requisition)].

Forms VII. to X., inclusive, of Certificates of Search are omitted.

FORM XI.

REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office.

Requisition for continuation of Search.

To the Clerk of Enrolments,
or the Registrar of
Royal Courts of Justice,
London, W.C.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of 18 , in the name (*or* names) of , from the day of to the day of 18 , both inclusive.

Signature, address, and description of person requiring the search }

Dated

Form XII. of Certificate of continued Search is omitted.

PART II.

CHAPTER I.

SS. 1, 2, 3, 4.

THE LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

51 & 52 VICT. c. 51.

An Act for registering certain Charges on Land, and for facilitating Searches for them. [24th December, 1888.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

INTRODUCTORY.

PART I.—INTRODUCTORY.

Short title.

1. This Act may be cited as the Land Charges Registration and Searches Act, 1888.

Commencement.

2. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this Act referred to as the commencement of this Act: Provided that any rules under this Act may be made, and any other thing for the purpose of bringing this Act into operation may be done, at any time after the passing thereof, but any such rules or thing shall not take effect until the commencement of this Act.

Extent.

3. This Act shall not extend to Scotland or Ireland.

Interpretation.

4. In this Act:

"Land" includes lands, messuages, tenements, and hereditaments corporeal and incorporeal of any tenure.

S. 4.
INTRODUCTORY.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

"Person" includes a body of persons corporate or unincorporate.

"Prescribed" means prescribed by any general rules made in pursuance of this Act.

"Act of Parliament" includes local and personal Act.

"Land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.

24 & 25 Vict. c. 133. 46 & 47 Vict. c. 61.

"Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887.

50 & 51 Vict. c. 57.

"Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

PART II.—REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

The Bankruptcy Court still evades the duty of keeping a proper record of bankruptcies and receiving orders so as to facilitate a search, which at present is the most onerous of all searches, and cannot be made with any certainty as to a correct result.

Writs and orders.

SS. 5, 6.

REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

Writs or orders not in bankruptcy require to be re-registered under this Act every five years : s. 5 (3).

Registration under this Act supersedes registration in the Supreme Court : s. 5 (4).

The search will be in the name of the vendor or mortgagor : s. 5 (2).

Search for writs or orders before 1889, and for *lis pendens*, must still be made to the same extent as if this Act had not passed (s. 6 proviso).

Register of writs and orders affecting land.

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land.

(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3.) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

Protection of purchasers against non-registered writs and orders.

6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

Provided that—

(*a.*) where the writ or order is at the commencement of this Act registered in pursuance of the Act of the session held in the twenty-seventh and twenty-eighth years of Her Majesty, chapter one hundred and twelve, intituled "An Act to

amend the law relating to future judgments, statutes, and recognizances," nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;

SS. 6, 7, 8, 9.

REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

(*b.*) where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

PART III.—REGISTRATION OF DEEDS OF ARRANGEMENT.

REGISTRATION OF DEEDS OF ARRANGEMENT.

All deeds of arrangement, whether executed before or after the commencement of the Act, must be registered (s. 9), but one year is allowed for registration of deeds executed before 1889 (s. 9).

The search will be in the name of the vendor or mortgagor.

Deeds of arrangement.

7. A register (in this Act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of arrangement may be registered therein, in the prescribed manner, in the name of the debtor.

Register of deeds of arrangement affecting land.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Registration of deeds of arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this Act, shall be void as against a person who, after the commencement of this Act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this Act until the expiration of one year from the commencement of this Act if registered within that year.

Protection of purchasers against unregistered deeds of arrangement.

SS. 10, 11, 12.

Part IV.—Registration of Land Charges.

Registration of Land Charges.

Only land charges created after 1888 require to be registered under this Act.

Land charges after 1888.

As to land charges before 1889 the same searches must be made as formerly. The provision in s. 13 for registration of an assignment made after 1888, gives assistance, but cannot be relied on as there may be no such assignment.

Before 1889.

Against whom.

The search (s. 10) must be in the name of the person entitled whether legally or equitably to the freehold in possession when the charge was created; so that it cannot be confined to the name of the immediate vendor or mortgagor, but must be carried back against all owners in possession for the time being.

Registry of land charges.

10. A register, in this Act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

(1.) In the case of freehold land, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge:

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

Expenses.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this Act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any part of such land charge next after such expenses are incurred.

Protection of purchasers against un-

12. A land charge created after the commencement of this Act shall be void as against a purchaser for value

of the land charged therewith, or of any interest in such land, unless and until such land charge is registered in the register of land charges in the manner mentioned in this Act.

registered charges.

13. After the expiration of one year from the first assignment by act *inter vivos*, occurring after the commencement of this Act, of a land charge created before the commencement of this Act, the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges in the manner mentioned in this Act prior to the completion of the purchase.

Non-registered land charge existing at commencement of this Act.

Vacation of entry.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

PART V.—SUPPLEMENTAL.

Index to registers.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this Act.

Searches.

16. Any person may search in any register or index kept in pursuance of this Act on paying the prescribed fee.

Official searches.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to the Conveyancing Act, 1882, except so much of those provisions as relates to the making of general rules, shall apply to searches in any register or index kept in pursuance of this Act in the register of *lis pendens*, the register of deeds of arrangement affecting land, and the register of land charges, in the same manner as if this Act had been described in Part I. of

45 & 46 Vict. c. 39.

SS. 17, 18.

SUPPLEMENTAL.

the First Schedule to the Conveyancing and Law of Property Act, 1881.

44 & 45 Vict. c. 41.

General rules.

18. The Lord Chancellor may at any time after the passing of this Act, and from time to time, with the concurrence of the Commissioners of Her Majesty's Treasury as to fees, make such general rules as may be required for carrying this Act into effect.

CHAPTER II.

RULES UNDER THE LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888 (1st JANUARY, 1889).

Rule 1.—The several Registers established by the Act shall contain the following particulars respectively, or such other particulars as the Registrar shall from time to time determine :—

(1.) The Register of Writs and Orders shall contain :—

(*a.*) The name, address, and description of the person whose land is affected.

(*b.*) The date and nature of the writ or order, and the court, and the action or matter, by and in which the writ or order was issued or made.

(*c.*) The date of registration, and of any renewal of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

(2.) The Register of Deeds of Arrangement shall contain :—

(*a.*) The name, address, and description of the person whose land is affected.

(*b.*) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three.

(*c.*) The date of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

(3.) The Register of Land Charges shall contain :—

(*a.*) The name, address, and description, and capacity (that is to say, whether (i.) beneficially entitled to the first estate of freehold; (ii.) tenant on the Court Rolls; or (iii.) beneficially entitled to a lease for lives or a life at a rent or for years) of the person in whose name the registration is made.

(*b.*) The date of the charge, the statute under which it is made, and the parish in which the land charged is situated.

(*c.*) The date of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the Registers themselves, all entries in such Registers being made alphabetically in the manner now used in the Register of Judgments in the Central Office of the High Court of Justice, or in such other manner as the Registrar shall from time to time determine.

Rule 4.—Applications for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the Schedule hereto, or in such other forms as the Registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the Office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the Register, such evidence in respect thereof as the Registrar shall from time to time think necessary shall be required.

Rule 8.—These Rules may be cited as the Land Charges Rules, 1889.

THE SCHEDULE. FORMS.

FORM 1.—*Application to Register a Writ or Order.*

FORM 2.—*Application to Register a Deed of Arrangement.*

FORM 3.—*Application to Register a Land Charge.*

FORM 4.—*Declaration in support of an Application to Register.*

FORM 5.—*Application for an Official Search.*

[*This Form* 5 *provides for the following searches:—Register of Writs and Orders for the period of five years ending the day of* 18 , *inclusive; Deeds of Arrangement from the day of* 18 , *to the day of* 18 , *inclusive; Land Charges from the day of* 18 , *to the day of* 18 , *inclusive. As to the time over which the last two searches should extend* *see p.* 166.]

FORM 6.—*Declaration by separate Instrument as to purposes of Search.*

FORM 7.—*Certificate of Official Search.*

FORM 8.—*Requisition for Continuation of Official Search.*

FORM 9.—*Certificate of Continuation of Official Search (to be endorsed on the original Certificate).*

[*The Forms are not set out here as they are sold at the Office of Land Registry. See Rule* 5.]

CHAPTER III.

SEARCHES GENERALLY.

Practical directions as to searches.

For full information as to searches the reader is referred to Dart, V. & P., Vol. I., p. 524, 6th ed., and Elphinstone and Clarke on Searches (including appendix containing the foregoing Act). But the following short statement as to the most usual searches may be useful in practice.

Judgments.

The search for judgments registered under 1 & 2 Vict. c. 110, and requiring to be re-registered every five years under 2 & 3 Vict. c. 11, now only applies to judgments entered up on or before 23rd July, 1860. Judgments entered up between that day and 30th July, 1864 (whether there be notice or not), do not affect a purchaser or mortgagee except upon writ issued and registered and execution levied within three calendar months after registration (23 & 24 Vict. c. 38). But the writ had to be registered in the name of the creditor, and not of the debtor (s. 2). In order, therefore, to search for writs of execution on judgments between 23rd July, 1860, and 30th July, 1864, it is necessary (1) to search for judgments against the owner between those dates, and having thus found the name of a judgment creditor (if any), then (2) to search for writs of execution in that name for three calendar months preceding the search. This search, again, is only necessary in respect of judgments entered up before or on 29th July, 1864. Judgments entered up after that day do not under 27 & 28 Vict. c. 112, affect land of any tenure until actually delivered in execution, so that a purchaser or mortgagee, in order to protect himself against the last-mentioned judgments, has only to see that the vendor or mortgagor is in possession at the time of completion. If therefore the age of the vendor or mortgagor is such that no judgment could have been obtained against him on or before 29th July, 1864, search for judgments against him is not necessary if he is in possession. But lands may be actually delivered in execution without any registration of the writ under 27 & 28 Vict. c. 112, and in cases where there is any supposed liability to an execution the best course is to ascertain, as late as practicable before completion, whether there is any writ in the hands of the sheriff. By s. 3 of that Act, the writ is only required to be registered after the land shall have been actually delivered in execution; but this registra-

Registration of writs under 23 & 24 Vict. c. 38.

Writs of execution on judgments.

Registration under 27 & 28 Vict. c. 112.

tion must be in the name of the judgment debtor, and no other or prior registration of the judgment is necessary.

Appointment of receiver.

The appointment of a receiver is equivalent to an actual delivery in execution, within the meaning of 27 & 28 Vict. c. 112, of the equitable estate in land of a judgment debtor (*Hatton* v. *Haywood*, L. R. 9 Ch. Ap. 229; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Ex parte Evans*, 13 *ib.* 252).

Registration under 51 & 52 Vict. c. 51.

No registration of writs of execution was formerly required (*Re Pope* 17 Q. B. D. 743), but now the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), p. 156, makes provision for registration of all writs and orders (other than in bankruptcy) affecting land, and search must be made at the Office of Land Registry.

Crown debts.

Crown debts are liable to continue in force against the debtor longer than judgments, the most common obligation to the Crown being the bond given on release of a railway deposit, but the cases must be rare in which a Crown debt before 4th June, 1839, is now subsisting so as to necessitate a search at the Exchequer office. Crown debts after that date are required to be registered (2 & 3 Vict. c. 11, s. 8); and, in order to bind purchasers, mortgagees or creditors becoming such after 31st December, 1859, to be re-registered every five years (22 & 23 Vict. c. 35, s. 22). So that for a Crown debt from 4th June, 1839, up to and including 1st November, 1865, a search for five years only is required. As to Crown debts after the latter date, the search must be for writs of execution under 28 & 29 Vict. c. 104, s. 48, but there is no three months' limit as there was in case of executions on ordinary judgments under 23 & 24 Vict. c. 38.

Lis pendens.

A *lis pendens* must be re-registered every five years (2 & 3 Vict. c. 11, s. 7), and the search should extend over that period.

Annuities.

The search for old enrolled grants of life annuities can now rarely, if ever, be necessary.

Rentcharges.

The search for entries of grants of life annuities or rentcharges after 26th April, 1855, registered under 18 & 19 Vict. c. 15, s. 12, should be from the commencement of the register on that day if the person against whom search is made had then become entitled to the property and attained twenty-one before that day, but otherwise from the time when he became entitled to the property or the day when he attained twenty-one, whichever last happened.

Disentailing deeds.

In case of entailed property a search for enrolled deeds of disentail from the time when the tenant in tail attained twenty-one may be advisable. He may have given a security while his estate was reversionary, thereby creating a base fee, and yet the deeds might be in his possession without any default on the part of the creditor.

Bankruptcies.

The search for bankruptcies must still be made by the purchaser's solicitor in the registers at the Bankruptcy Court until means are afforded for an official search. The search should in strictness extend back for twelve years, but a five years' search is commonly deemed sufficient (Dart, 567, 6th ed.). The position of a vendor or mortgagor is, however, generally so well known as to render a bankruptcy search unnecessary.

Insolvencies.

The search for insolvencies can rarely now be necessary.

Search for writs, &c., under Act of 1888.

Searches for writs and orders for five years, and also for deeds of arrangement and land charges must be made at the office of Land Registry in the registers kept there pursuant to the Land Charges Registration and Searches Act, 1888. The time over which the search for deeds of arrangement and land charges should extend must be determined in the same way as above mentioned with respect to the time for a search in the rentcharge register.

Extent of search.

The practice is to make the above searches only since the last preceding sale or mortgage, and not to search against preceding owners, it being assumed that they made proper searches and found nothing adverse; but the same practice is not generally observed in the case of searches in the Yorkshire, Middlesex, and Irish Deeds Registries.

The searches for judgments, *lis pendens*, and Crown debts may be limited in each case to the period of five years back from the time of search, but they should be made in the names of all persons who were owners since the last purchase or mortgage (see *Benham* v. *Keane*, 1 J. & H. 685, 708) except where it is known that an owner had not attained twenty-one on 29th July, 1864.

Writs of execution on Crown debts.

Writs of execution on Crown debts are entered in the same register as those on judgments under 27 & 28 Vict. c. 112 (Dart, 564, 6th ed.), and the time for search is not limited except by the commencement of the register (1st November, 1865) under 28 & 29 Vict. c. 104, and no re-registration is required, so that the search for executions must be made generally back to that date or the day when the vendor or mortgagor came of age, and the certificate will include executions (if any) on ordinary judgments as well as those on Crown debts (see note to R. S. C., December, 1882, Form VI., p. 152). It would simplify the search if separate registers were kept, the number of executions on Crown debts being no doubt comparatively small, and the search for other executions being seldom necessary.

Copyholds.

Search for Crown debts is not necessary as regards copyholds (Dart, 562, 6th ed.).

Trustees. Mortgagees who are paid off.

The only search necessary against trustees, or mortgagees, is for *lis pendens* for five years. It is not necessary to make any search against mortgagees who have been paid off; see 18 & 19 Vict. c. 15, s. 11.

Certificates of searches to be abstracted.

Where the vendor or mortgagor has in his possession certificates of official searches they ought now to be shewn on the abstract.

Certificate conclusive.

In *Procter* v. *Cooper* (2 Drew. 1) a purchaser making a search for judgments was held to have notice of an incumbrance which he failed to discover. The official certificate is now conclusive on all matters within s. 2 of the C. A., 1882, and the solicitor should rely on that, and not search himself.

Enrolled deeds.

Subs. 11 of the last mentioned s. excludes from the operation of that s. all enrolled deeds, the object being to make the official certificate binding only on those who make use of the office register for recording their incumbrances, and not to affect the validity of any actual conveyance upon which the title to land depends, as in case of a disentailing assurance. But a search for deeds enrolled, though so excluded,

can be asked for (see R. S. C., December, 1882, Form III., p. 149), and a certificate of search obtained. It will, however, only extend to deeds enrolled within two years, after which time enrolments of deeds and recognisances are removed to the Record Office (R. S. C. 1883, Ord. LXI. r. 13), and search must be made there by the solicitor himself. It is conceived that a solicitor will be justified in relying on an official certificate for enrolled deeds so obtained, so far as it extends, though this s. does not expressly exonerate him. The Court could scarcely make him answerable for an omission by its own officer.

Yorkshire registries.

Under the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54, s. 20), an official return can be obtained to a search. A solicitor, trustee, &c. (s. 23), is held harmless from any error in the return, but the return is not conclusive in favour of the purchaser.

Office copy and certificate of enrolment.

If the certificate of search discloses an enrolled deed material to the title, an office copy of the enrolment may be obtained under the 5th of the Rules made under s. 2 of C. A., 1882, p. 147. An office copy is made evidence of the enrolment by 12 & 13 Vict. c. 109, s. 19. By s. 18 of that Act a certificate of enrolment is authorised to be endorsed on every enrolled deed certifying the day of enrolment, and when sealed and stamped with the seal of the Enrolment Office, is evidence that the deed was enrolled on the day mentioned in the certificate.

Deeds Registry Searches.

Search in a deeds registry should be against each successive owner from the date of the deed under which he acquired his interest to the date of *the registration* of the deed by which he parted with his interest, both dates inclusive. Whether the search should extend over the whole period of the abstract is a question to be considered in each case. Search against a testator or intestate must be continued after his death against him as well as his devisee or heir up to the date of registration of the conveyance by the devisee or heir. Where the will has to be registered within a given time and is not so registered it may be advisable also to search against the heir before taking a title from the devisee. Where a mortgagee sells under his power of sale it is not necessary to search against the mortgagor after the date of registration of the mortgage.

PART III.

CHAPTER I.

THE TRUSTEE ACT, 1888.

51 & 52 VICT. c. 59.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees. [24th December, 1888.]

SS. 1, 2.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows; that is to say,

Short title, extent, and definition.

1.—(1.) This Act may be cited as the Trustee Act, 1888.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

Receipt of money by solicitor as agent.

2.—(1.) It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the fifty-sixth section of the Conveyancing and Law of Property Act, 1881; and no trustee shall be chargeable

44 & 45 Vict. c. 41.

S. 2.

with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said fifty-sixth section, as the same would have had if the person appointing such solicitor had not been a trustee: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee.

As to indorsed receipt.

Though this subs. uses the expression "deed containing any such receipt as referred to in" s. 56 of C. A., 1881, it is conceived that it applies where the receipt is indorsed as well as where it is in the body of the deed. The indorsement is part of the deed, and moreover an indorsed receipt is expressly referred to in s. 56.

Where solicitor is one of the trustees.

Where the solicitor is himself one of the trustees it is conceived that this subs. does not enable payment to be made to him as solicitor for himself and co-trustees. Such payment would be a payment to one of several trustees and not a good payment.

(2.) It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by such trustee, and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money to remain in the hands or under the control of the banker or solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such banker or solicitor to pay the same to the trustee.

(3.) This section shall apply only where the money or

SS. 2, 3, 4.

valuable consideration or property is to be received after the passing of this Act.

Depreciatory conditions on sales by trustees.

3.—(1.) No sale made by a trustee shall be impeached by any cestui que trust upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it shall appear that such purchaser was acting in collusion with such trustee at the time when the contract for such sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section shall apply only to sales made after the passing of this Act.

Loans by trustees.

4.—(1.) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend.

To keep the trustee harmless under this section the certificate of the surveyor should shew

Surveyor's certificate.

(1) That the loan does not exceed two-thirds of the capital value of the property as estimated by the surveyor and stated in the report;

(2) That the surveyor advises to the effect that the loan may be made or that the security is sufficient.

Components of value.

The Act imposes no condition as to the components of value. They may include buildings, mines, timber, or valuable rights of any kind. It is only necessary that the surveyor advises the value to be sufficient. In the case of mines or timber of large value he would probably advise some special provisions as to working or cutting.

The statement as to value and the advice must be in the report itself, and not in a subsequent letter or in a postscript to the report.

(2.) No trustee lending money upon the security of any leasehold property shall be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title.

(3.) No trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property, or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act.

Liability for loss by reason of improper investments.

5.—(1.) Where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

SS. 5, 6, 7, 8.

(2.) This section shall apply to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act.

Indemnity for breach of trust.

6.—(1.) Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act.

Trustee may insure buildings.

7.—(1.) It shall be lawful for, but not obligatory upon, a trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2.) This section shall not apply to any building or property which a trustee is bound forthwith to convey absolutely to any cestui que trust upon being requested so to do.

Statute of limitations may be pleaded by trustees.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by

the trustee and converted to his use, the following provisions shall apply :—

(*a.*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him :

(*b.*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

Investments on mortgage of long terms.

9. A power to invest trust money in real securities shall authorise and shall be deemed to have always authorised an investment upon mortgage of property held for an unexpired term of not less than two hundred years and not subject to any reservation of rent greater

SS. 9, 10, 11.

than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent.

Trustees of renewable leaseholds may renew.

10. It shall be lawful for any trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if he shall in his discretion think fit, and it shall be the duty of such trustee, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustee from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same, unless the consent in writing of such person is obtained to such renewal on the part of the trustee.

This and the following s. in effect revive ss. 8 and 9 of Lord Cranworth's Act (23 & 24 Vict. c. 145) which were repealed by S. L. A., 1882, s. 64, but they are more extensive, applying to all trusts whether created before or since Lord Cranworth's Act.

Power to trustee to raise money to meet fines on renewal of lease.

11. In case any money shall be required for the purpose of paying for the renewal of any lease as aforesaid, it shall be lawful for the trustee effecting such renewal to pay the same out of any money which may then be in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he shall not have in his hands as aforesaid sufficient money for the purpose, it shall be lawful for the trustee to raise the money required by mortgage of the hereditaments to be contained in the renewed lease, or of any other hereditaments for the time being subject to the

subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject; and no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purpose aforesaid.

Application of Act.

12.—(1.) This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act.

(2.) Provided always, that save as in this Act expressly provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

CHAPTER II.

INVESTMENTS AUTHORISED FOR TRUST MONEY.

Trustee investments.

(1.) Where trustees have power to invest upon Government securities or Parliamentary stocks, funds or securities, they may also invest in securities upon which by general order cash under the control of the Court may from time to time be invested (23 & 24 Vict. c. 38, s. 11).

The general order now in force is as follows (issued 14th November, 1888) :—

ORDER XXII., RULE 17.

1. Rule 1 of the Rules of the Supreme Court, August 1888, is hereby annulled (except so far as it annulled Order XXII., Rule 17, of the Rules of the Supreme Court, 1883), and the following Rule shall stand in lieu thereof :—

Cash under the control of or subject to the order of the Court may be invested in the following stocks, funds, or securities, namely :—

Two and Three-quarters per Cent. Consolidated Stock (to be called after the 5th of April, 1903, Two and a Half per Cent. Consolidated Stock) :

Consolidated Three Pounds per Cent. Annuities : (*a*)

Reduced Three Pounds per Cent. Annuities : (*a*)

Two Pounds Fifteen Shillings per Cent. Annuities :

Two Pounds Ten Shillings per Cent. Annuities :

Local Loans Stock under the National Debt and Local Loans Act, 1887 :

(*a*) These have now all been redeemed and ceased to exist.

Exchequer Bills:

Bank Stock:

India Three and a Half per Cent. Stock:

India Three per Cent. Stock:

Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment:

Stocks of Colonial Governments guaranteed by the Imperial Government:

Mortgage of freehold and copyhold estates respectively in England and Wales:

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.:

Three per Cent. Metropolitan Consolidated Stock:

Debenture, preference, guaranteed, or rentcharge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares:

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment:

2. This Rule shall come into operation on the 26th of November, 1888, and may be cited as the Rule of the Supreme Court, November 1888, or may be cited according to the heading thereof, with reference to the Rules of the Supreme Court, 1883.

Investments authorized before Nov. 1888.

Before this order came into operation the following investments included in it were authorized as trust investments (besides Consolidated £3 per cent. Annuities):—

(*a*) Real securities in the United Kingdom, or Stock of the Bank of England or Ireland, if not expressly forbidden: 22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, s. 12; real securities in England or Wales, proper for investment by trustees, being first mortgages of fee simple or copyhold lands, and in Ireland first mortgages of fee simple lands, or of leaseholds for lives at a head rent perpetually renewable, and also of lands held under fee farm grants made pursuant to 12 & 13 Vict. c. 105, and 31 & 32 Vict. c. 62.

(*b*) East India Stock created under Acts passed before the 20th August, 1867 (30 & 31 Vict. c. 132, s. 1), and under subsequent Acts: 32 & 33 Vict. c. 106; 36 & 37 Vict. c. 32; 37 & 38 Vict. c. 3; 40 & 41 Vict. c. 51; and 42 & 43 Vict. c. 60; Stock created for the purpose of the East India Railway Purchase Act, 1879, and deemed to be East India Stock (42 & 43 Vict. c. 43, s. 9); and securities the interest of which is guaranteed by Parliament (30 & 31 Vict. c. 132, s. 2), if not expressly forbidden in each case.

(*c*) Reduced and New £3 per cent. and £2 10*s.* per cent. Government Annuities and Exchequer Bills, in cases where there is power to invest in Government securities or Parliamentary stocks, funds or securities (23 & 24 Vict. c. 38, s. 11, and R. S. C. 1883, Or. xxii. r. 17).

(*d*) £2 15*s.* and £2 10*s.* per cent. Annuities, where there is power to invest in Consolidated or Reduced or New £3 per cent. Annuities: 47 & 48 Vict. c. 23, s. 6 (6).

(*e*) Stock of the Metropolitan Board of Works where not forbidden, and where Government securities are authorised: 34 & 35 Vict. c. 47, s. 13.

Long term is "real security."

"Real security" now includes and is now to be taken as having always included an unexpired term of not less than two hundred years, and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent (51 & 52 Vict. c. 59, s. 9).

The following investments of trust money are authorized, independently of the Order of the 14th November, 1888, subject as mentioned in the paragraphs relating thereto:—

(2.) Securities, the interest of which is guaranteed by Parliament, if not expressly forbidden: 30 & 31 Vict. c. 132, s. 2.

(3.) Debenture stock of companies whose mortgages or bonds are authorized as an investment, unless the contrary is expressed: 34 & 35 Vict. c. 27.

(4.) Debentures issued under the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), as amended by 33 & 34 Vict. c. 20, in cases where trustees can invest in the shares, stock, mortgages, bonds, or debentures of companies incorporated by, or acting under an Act of Parliament.

(5.) Securities of the Government of the Isle of Man created under 43 & 44 Vict. c. 8, where trustees can invest in Colonial Government securities.

(6.) Charges under the Improvement of Land Act, 1864, or mortgages thereof, where trustees can invest in real securities: 27 & 28 Vict. c. 114, s. 60.

The special Acts of many local authorities and corporations contain an express provision authorizing their debentures or stock to be taken by trustees. In all settlements therefore where such debentures or stock are not intended to be authorized, the investments should be directed to be made in specified securities "and not otherwise." But see *Wedderburn's Trusts*, 9 Ch. D. 112.

PART IV.

CHAPTER I.

SUMMARY OF THE MARRIED WOMEN'S PROPERTY ACT, 1882.

THE general result of this Act as regards the form and effect of documents is as follows:—

Married woman's power of disposition.

(1.) As to disposal of property or things in action

(*a*) Every woman married after 1882, and

(*b*) Every woman married before 1883, as regards property and things in action acquired after 1882,

can convey as if she were a feme sole, and the concurrence of her husband in any disposition is not necessary.

Separate use.

(2.) A trust for the separate use of a married woman appears no longer absolutely necessary. A simple restraint on anticipation, where desired, is effectual (s. 19), even in case of a settlement made by herself of her own property; but as (see (12) *infra*) it has been held that the operation of the Act ceases with the coverture, a gift to a married woman should still be made expressly for her separate use.

Acknowledgment.

(3.) Acknowledgment of deeds is only necessary where the property was acquired and the woman was also married before 1883, in which case the mode of acknowledgment is now simplified by C. A., 1882, s. 7.

Executrix or trustee.

(4.) A married woman can be made an executrix or trustee without any inconvenient consequences as regards mode of dealing with the property.

Power of appointment not necessary.

(5.) It is no longer necessary to give a married woman a power of appointment in order to enable her to dispose of property either by deed or will (but see (12) *infra*).

Covenant to settle future property.

(6.) In settlements it is sufficient that she alone covenants to settle her future property. According to the decisions on s. 19 the covenant also of the husband alone still has effect as before the Act to bind the wife's property though made her separate property under the Act. Where the wife is an infant at the time of marriage, her covenant remains in force if she dies without having done any act to avoid it: *Burnaby* v. *Equitable Rev. Int. Soc.*, 28 Ch. D. 416. On attaining twenty-one she may be put to her election to confirm the settlement or take nothing under it unless she is restrained from anticipation: *Willoughby* v. *Middleton*, 2 J. & H. 344; *Smith* v. *Lucas*, 18 Ch. D. 531; *Re Vardon's Trusts*, 31 Ch. D. 275.

Where wife an infant.

Post-nuptial settlement by married woman.

(7.) A covenant by a married woman will no longer be void, but a covenant by her to settle, and also a settlement by her of real or personal estate, will, unless a consideration is given, be voluntary and liable to all the incidents of a voluntary covenant or settlement. The principle of *Teasdale* v. *Braithwaite*, 4 Ch. D. 85, 5 *ib.* 630, and *Re Foster and Lister*, 6 Ch. D. 87, no longer applies.

(8.) Except that a woman in settling her property has the power, which a man has not, to restrain herself from anticipation during coverture, all settlements by women are now placed on the same footing as settlements by men (s. 19).

Separation deeds.

(9.) In the case of a woman married after 1882 her debts are payable out of her separate property only, s. 1 (2), and the covenant of indemnity against the wife's debts hitherto inserted in a simple deed of separation for the purpose of supporting it as a settlement for value, is now unnecessary, and ceases to be available for that purpose, but she herself can contract and so make it a settlement for value. A trustee is not necessary.

Deeds generally.

(10.) It seems that a document sealed and delivered by a married woman is now her deed at common law, and not merely a writing sealed and delivered, she being for all purposes of property and contract a feme sole; but the Act does not expressly say so.

Equity to settlement.

(11.) The Act seems to render obsolete as to women married after 1882 all the cases as to fraud on the husband's marital rights, and also, as regards property devolving after 1882 on any married woman, all the cases as to reduction in possession, and as to her equity to a settlement.

Separate use.

(12.) The question whether a gift is for the separate use of a married woman may still be of importance. The effect of separate use remains after the death of the husband, provided nothing is done to put an end to it. Thus a sum of stock or land given for the separate use of a woman and remaining undealt with at her death passes by a will made during coverture though she dies a widow: *Willock* v. *Noble*, L. R. 7 H. L. 580; but Jessel, M.R., held that arrears of an annuity given for separate use and accruing due during widowhood, when separate use does not exist, do not so pass (*Menteath* v. *Campbell*, 26 W. R. 848).

Separate property under the Act.

The probable intention of the framers of the Act (and as Butt, J., seemed to think in *Re Price*, 12 Prob. D. 137, 138, the actual effect of the Act) was to put a married woman in every respect in the same position, as regards disposition and contract, as if she were a feme sole. In words she is made "capable of disposing by will or otherwise of *any real or personal* property *in the same manner* as if she were a feme sole" (s. 1). By ss. 2 and 3 "separate property" is defined so as to include *all* property devolving *after* marriage or, in case of a woman married before 1883, *all* property devolving after 1882. The will of a married woman like any other will speaks from her death, and would on her death a widow exercise an ordinary power of appointment (Farwell on Powers, p. 93), though it did not exist at the date of the will (*Thomas* v. *Jones*, 1 De G. J. & S. 63, 82). It is difficult to see how the words of the Act do not give an equally extensive power.

Construction of the Act.

However, it has been held that the Act is operative only during coverture, making the woman while under coverture a statutory feme sole; but ceasing to be operative on the death of the husband, when she becomes a

common law feme sole, so that her will made during coverture has no effect on property acquired after the coverture: *Re Price, Stafford* v. *Stafford*, 28 Ch. D. 709. From the judgment in that case it seems questionable whether the learned judge (Pearson, J.) did not consider a will made during coverture wholly inoperative after the coverture even as to separate property under the Act.

It follows that a contract by a married woman made during coverture cannot under the Act be enforced against her as a widow except in respect to what was her separate property during the coverture (see s. 1, subs. 4, which applies only to separate property "thereafter acquired") and cannot be enforced against any property acquired after the coverture has ceased (*Beckett* v. *Tasker*, 19 Q. B. D. 7). But she can convey during coverture a reversion on the death of her husband whether vested or contingent. All gifts to married women should therefore still be made expressly for their separate use, as giving them the most extensive power of disposition.

Joint tenancy.

(13.) It is conceived that under a gift after 1882 to husband and wife in terms which would make them joint tenants if they were not married, they will no longer take as one person or hold by entireties, but take as joint tenants in the same manner as two unmarried persons. So under a limitation to husband and wife and the heirs of their bodies they will take as tenants in common in tail (see Fearne, C. R. 39, 40). But husband and wife still take only one moiety where there is a gift to them and a third person (*Re Jupp, Jupp* v. *Buckwell*, 39 Ch. D. 148; *Re March, Mander* v. *Harris*, 27 Ch. D. 166).

Husband's right to personalty of wife intestate.

(14.) The Act contains no express provision as to whether a husband married after 1882, or a husband married before 1883 in respect to property acquired after 1882, will, in the absence of any disposition by the wife during her life or by will, become absolutely entitled in his marital right to the wife's personal estate on taking out letters of administration, or will become tenant by the curtesy. Under the old law equity only

interfered just so far as was necessary to give effect to the separate use. By the death of the wife without making any disposition, the separate use was exhausted, and all the husband's rights remained as if it had never existed (see *Cooper* v. *Macdonald*, 7 Ch. D. 296, per Jessel, M.R.). Now (see M. W. P. A., s. 1) the wife takes as a *feme sole*, and is a separate individual, the husband takes nothing in his marital right during the coverture. As regards personal estate s. 25 of the Statute of Frauds (29 Ch. ii. c. 3) gave to the husband beneficially the personal estate of his wife dying intestate, as well as the right to take out letters of administration, and still remains operative (*Re Lambert, Stanton* v. *Lambert*, 39 Ch. D. 626). No such question arose on the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), which does not use the words "feme sole," but only the ordinary expressions "separate use" (see ss. 1, 3, 4, 5, 7, 8, 10, 12) and "separate property" (see ss. 2–5, 9, 11, 13, 14), not interfering therefore with the husband's marital rights further than is done by the same expressions used in a settlement or will.

Preserved by Statute of Frauds, s. 25.

Wife not feme sole under Act of 1870.

Estate by curtesy.

(15.) The estate by the curtesy was an extension during the husband's whole life (arising on birth of inheritable issue) of his freehold in right of his wife during the joint lives (Burton, Real Prop. 145–6), where the estate of the wife was an inheritance in possession (Fearne, C. R. 341–2). If the estate by the curtesy still exists, it is wholly changed in its nature. The husband has no present freehold in his wife's right, nor can he have any remainder, there being no particular estate. He must take, if at all, by *quasi* descent in the same manner as the heir. It seems difficult to say that the Act impliedly creates a new kind of descent.

The wife's term and chattels.

(16.) The wife's term of years in land, and her chattels passing by delivery, acquired after 1882, no longer vest legally in the husband, nor are they capable of being assigned by him. He must now, it seems, take out letters of administration to complete his title on her death.

Wife's joint tenancy in chattels.

(17.) Also marriage is no longer a severance of the wife's joint-tenancy in chattels passing by delivery (*see* Wms. Pers. P. 409, 9th ed.).

Coverture now no disability.

(18.) Under the Statutes of Limitation there is no longer in regard to property acquired after 1882 any saving in favour of a wife on account of the disability of coverture. She is free to sue.

Wife divorced for purposes of her own property.

(19.) The Act does not enable a donor to make a conveyance or devise to husband and wife which will put them in the same position as before the Act. Every married woman coming within the terms of the Act appears now to be made a completely distinct person from her husband for all purposes connected with *her own* property. The Act does not affect her right to dower or freebench, or under the Statutes of Distribution in respect to her husband's property.

Disability of women married before 1883.

(20.) The Act affords no assistance in the disposition by a woman married before 1883 of property acquired by her before that year. She can still only dispose by acknowledged deed (under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, as amended by C. A., 1882, s. 7) of land or an interest in land or money liable to be laid out in land. She can also, under 20 & 21 Vict. c. 57, dispose of a reversionary interest in personal estate acquired under an instrument dated after 1857, and not derived under her marriage settlement. The latter Act only applies to a reversionary interest in personal estate, and it is not clear that either she or her husband separately or together can assign a simple *chose in action*, for instance, a debt or a policy of assurance effected in her name, as distinguished from an equitable *chose in action*, such as a legacy or other money held in trust for her, which would come under the description of personal estate.

Whether 20 & 21 Vict. c. 57, is applicable to *choses in action*.

CHAPTER II.

MARRIED WOMEN'S PROPERTY ACT, 1882.
45 & 46 VICT. c. 75.

S. 1.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

This Act is retrospective as to procedure: *James* v. *Barraud*, 31 W. R. 786; *Gloucestershire Bg. Co.* v. *Phillipps*, 12 Q. B. D. 536.

Married woman to be capable of holding property and of contracting as a feme sole.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

The whole effect of this s. appears to be contained in the words "feme sole" and "without the intervention of a trustee." Before the Act it was competent for a married woman to "acquire, hold, and dispose of" property, but she was not entirely in the same position as a *feme sole*, and the intervention of a trustee was necessary to prevent the legal estate or right vesting in her husband, and to enable it to pass without an acknowledged deed. The words "separate property" seem used,

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not as referable to separate use, but in the same way as a member of a partnership may be said to be entitled to certain property as his "separate property," as distinguished from partnership property. This subs., taken by itself, is merely enabling; it does not say whether, in order to enable a married woman to take separate property it must be expressly given to her as such, in the same manner as formerly in case of property given for her separate use. This, however, appears provided for by s. 2 as to a woman married after 1882, and by s. 5 as to a woman married before 1883, in respect to property acquired after 1882. Under these ss. she is "entitled to have and to hold, and to dispose of in manner aforesaid, as her separate property," so that an absolute separate title is thereby created, and it seems quite independent of the terms of gift, so that it is not now legally possible to create the old status as to property between husband and wife.

Applies only to property acquired after 1882;

and during coverture only *qu.*

This s. applies to property of a woman married before 1883 only where it was acquired after 1882: *Re Harris' S. E.*, 28 Ch. D. 171. Also Pearson, J., has held that it is confined in its operation to property acquired during the coverture, and consequently a will made or republished during widowhood is necessary in order to dispose of property acquired during widowhood: *Re Price, Stafford* v. *Stafford*, 28 Ch. D. 709.

Release of power not necessary.

Where property was held in trust for a widow for life for her separate use and after her death for such persons as she should during coverture by will, and when discovert by deed or will appoint, and in default, for her absolutely, so that before her second marriage she was entitled to have it transferred for her absolutely; it was held that she remained so entitled after her second marriage subsequently to the Act: *Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622.

Notwithstanding this Act a married woman cannot make a valid gift by will under a statute enabling gifts by will for certain purposes (as the Church Building Act, 43 Geo. 3, c. 108), but which does not extend to "women covert without their husbands": *Re Smith, Clements* v. *Ward*, 35 Ch. D. 589.

General power.

It seems doubtful whether the exercise by a married woman of a general power of appointment by will makes the appointed fund separate property within this subs.: *Re Roper, Roper* v. *Doncaster*, 39 Ch. D. 482.

Trust property.

Though, as will be subsequently shewn, the wording of s. 18 is rather deficient, it seems reasonably clear that this subs. and ss. 2 and 5 include all trust property. The words are in strictness only applicable to property of which she is beneficial owner, but as she is liable separately on contract or in tort, and her husband need not be a party to any action (subs. 2), the same reasoning applies as in *Bathe* v. *Bank of England*, 4 K. & J. 564.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of

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suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

Married woman may sue and petition alone.

Under this subs. a married woman may sue alone for a tort committed before the commencement of the Act (*Weldon* v. *Winslow*, 13 Q. B. D. 784; *Lowe* v. *Fox*, 15 *ib.* 667), and for a trespass on a house occupied by her (*Weldon* v. *De Bathe*, 14 Q. B. D. 339), and she may petition alone (*Re Outwin's Trusts*, 31 W. R. 374) and is not liable to give

Security for costs.

security for costs (*Threlfall* v. *Wilson*, 8 P. D. 18; *Severance* v. *Civil Service Supply Association*, 48 L. T. 485; *Re Isaac, Jacob* v. *Isaac*, 30 Ch. D. 418); (see, however, *Re Robinson, Pindar* v. *Robinson*, W. N. 1885, 147; *Weldhen* v. *Scattergood*, W. N. 1887, 69, which seem in direct conflict with the cases previously quoted). But where a married woman instead of suing alone sues by a next friend who is not a responsible person, security for costs may be required, and she is not

Cannot be next friend, &c.

liable: *Re Thompson, Stevens* v. *Thompson*, 38 Ch. D. 317. She cannot act as next friend or guardian *ad litem* (*Re Duke of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465) and her husband is still liable for

Husband liable for torts.

her torts: *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; and he may recover

Liability for money lent to husband.

from her separate estate money lent to her or paid by her direction after, but not before, marriage: *Butler* v. *Butler*, 14 Q. B. D. 831; 16 *ib.* 374.

Must have property at date of contract.

To be liable under this subs. the married woman must have separate property at the time of the contract (*Re Shakespear, Deakin* v. *Lakin*, 30 Ch. D. 169; *Palliser* v. *Gurney*, 19 Q. B. D. 519), and not be

Restraint against anticipation.

restrained from anticipation (see s. 19 *infra*, *Draycott* v. *Harrison*, 17 Q. B. D. 147), and where she is so restrained a judgment against her on a promissory note made after the Act has no effect: *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Smith* v. *Whitlock*, 55 L. J. Q. B. D. 286.

Form of judgment.

For a form of judgment under this Act see *Scott* v. *Morley*, 20 Q. B. D. 120; *Downe* v. *Fletcher*, 21 *ib.* 11; see also *Bursill* v. *Tanner*, 13 *ib.* 691; *Nicholls* v. *Morgan*, 16 L. R. Ir. 409.

Judgment under R. S. C. 1883, Or. xvi. r. 52 may be ordered against a married woman, third party, as a *feme sole*, charging her separate estate even in respect of a liability incurred before the Act: *Gloucestershire Bg. Co.* v. *Phillipps*, 12 Q. B. D. 533.

(3.) Every contract entered into by a married woman

shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown. SS. 1, 2.

This subs. is not retrospective: *Conolan* v. *Leyland*, 27 Ch. D. 632. Not retrospective.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

This subs. is not retrospective: *Conolan* v. *Leyland*, 27 Ch. D. 632; *Turnbull* v. *Forman*, 15 Q. B. D. 234; *Re Roper*, *Roper* v. *Doncaster*, 39 Ch. D. 482. It renders obsolete the decision in *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, that the contract of a married woman bound so much only of her separate estate not subject to restraint on anticipation as existed at the date of the contract, and remained when judgment was enforced.

As to the definition of "contract" see s. 24.

A married woman on becoming bankrupt cannot be required to exercise in favour of the trustee in bankruptcy a general power of appointment (*Ex parte Gilchrist*, *Re Armstrong*, 17 Q. B. D. 521), but her life interest settled to her separate use without any restraint on anticipation passes to the trustee notwithstanding s. 19: *Re Armstrong*, *Ex parte Boyd*, 21 Q. B. D. 264. Married woman's general power.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

There seems no reason now why a married woman should not be a partner in trade with her husband. If so, does she carry on trade separately from him? Also, if she does not carry on trade, is she subject to the bankrupt laws in the same manner as any other non-trader? It is conceived that this subs. is not restrictive, and that as a *feme sole* in respect to her property, she must be subject to the same laws and liabilities as an actual *feme sole*.

As to what constitutes separate business see *Re Dearmer*, *James* v. *Dearmer*, W. N. 1885, 212.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by Property of a woman married after the Act to be held by her as a feme sole.

SS. 2, 3, 4, 5.

or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Accordingly the examination of a woman married since 1882, as to her consent under S. E. A. s. 50, is not necessary: *Riddell* v. *Errington*, 26 Ch. D. 220.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

To what debts, &c., applicable.

This s. applies unless it is shewn that money was not lent to the husband for the purpose of his business (*Re Genese, Ex parte District B. of London*, 16 Q. B. D. 700; *Ex parte Tidswell, Re Tidswell*, 35 W. R. 669; *Alexander* v. *Barnhill*, 21 L. R. Ir. 511), but if lent to a trading partnership of which the husband is a member, the wife, so far as respects the joint estate, is not postponed to other creditors: *Re Tuff, Ex parte Nottingham*, 19 Q. B. D. 88.

This s. is not retrospective: *Re Home, Ex parte Home*, 54 L. T. 301.

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

To what liabilities this s. applies.

This s. applies only to contracts made after its commencement: *Re Roper, Roper* v. *Doncaster*, 39 Ch. D. 482.

Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, rever-

sion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

When title must accrue.

The date when the title, whether vested or contingent, was acquired to any property, and not the date when it falls into possession, governs the application of the Act: *Reid* v. *Reid*, 31 Ch. D. 402 (overruling *Baynton* v. *Collins*, 27 *ib.* 604; *Re Thompson & Curzon*, 29 *ib.* 177; and *Re Hughes*, W. N. 1885, 62); *Re Tucker*, *Emanuel* v. *Parfitt*, 33 W. R. 932, W. N. 1885, 148; *Re Adames' Trusts*, 33 W. R. 834, W. N. 1885, 153; *Re Hobson*, *Webster* v. *Rickards*, 34 W. R. 195, W. N. 1885, 218; *Re Tench's Trusts*, *Ex parte McCormack*, 15 L. R. Ir. 406; *Re Beaupré's Trusts*, 21 *ib.* 397.

As to stock, &c., to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman shall be sufficient primâ facie evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners

SS. 6, 7.

for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

This s. applies to funds in the sole name of a married woman at the commencement of the Act, although "name," and not "sole name," occurs in the 14th line. The next section applies to those subsequently transferred to her sole name. The words "beneficially entitled" appear to exclude the case of trust property, which, however, seems supplied by s. 18.

This s. uses the old expressions "separate property as a married woman," and "separate use," but nothing seems to arise thereon. The words "separate use" and "separate property as a married woman" seem to be used as equivalent expressions (see first note to s. 1 (1) of this Act). In the next s. "separate property" is again used. It is presumed they mean the same thing as "separate property as a feme sole," but according to the decisions the general effect of the Act is not to assimilate "separate property" under the Act to "separate use."

As to stock &c., to be transferred &c., to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company

to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

This s. does not contain the words "beneficially entitled," and appears, therefore, to include trust property. See note to last s.

Investments in joint names of married women and others.

8. All the provisions herein-before contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

This s. appears not to include trust property standing in the names of a married woman jointly with any persons or person other than her husband, at the commencement of the Act, but does include trust property subsequently transferred to her jointly with any persons or person other than her husband (see notes to last two sects.).

As to stock, &c., standing in the joint names of a

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or

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married woman and others.

any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts herein-before contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them,

S. 11

or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

Points arising on s. 11.

The following points seem to arise on this s., and may, it is conceived, be answered or explained as follows:—

Policy effected by married woman.

1. A policy effected by a married woman remains her separate property if the objects in whose favour it is effected fail, and it can be disposed of by her as a *feme sole* (see ss. 1, 24).

S. 11.

When interests vest under.

2. If the policy is effected by a man for the benefit of his wife and children, or by a woman for the benefit of her husband and children, the beneficiaries acquire at the time or in the event specified in the policy, vested interests in like manner as in case of an ordinary policy effected and assigned to trustees on trust. If the wife or husband is to take a life interest only, it should be so expressed: see *Re Adam*, 23 Ch. D. 529. If the policy is effected by a man for the benefit of his wife alone it should be expressed that she shall take only in case she survives him, as otherwise the money will be her separate property, and the right to it will, on her death before him, devolve under her will.

How policy for benefit of wife should be expressed.

Policies effected under this s. by unmarried persons.

3. The power to effect a policy is not it seems, as in the Act of 1870, confined to a married man or woman. An unmarried man or woman may under this section effect a policy for any future wife or husband and children.

Issue other than children not within this s.

4. Children only and not issue generally are within the section.

Effect of this s. on policy.

5. The policy under this section is in effect a complete settlement of personalty incapable of being defeated by the person making it though there be no wife or children in existence. Nor can the insured surrender the policy.

6. In the absence of wife or husband or child capable of taking under the trusts, the policy is part of the estate of the insured, and would pass to his or her trustee in bankruptcy. A general power to surrender should not be reserved. If it were reserved, or could be implied, it could be exercised by the trustee in bankruptcy and thus defeat the settlement. The only power reserved (if any) should be to apply bonuses in reduction of premiums, or to surrender in exchange for a policy of smaller amount at a reduced premium, or with all premiums paid up.

7. Though this section does not, like the Act of 1870, say that wife and children are under the policy to take "according to the interest expressed," yet the trusts of the policy money may, it is conceived, be moulded in any way the insured desires for the benefit of wife and children.

Notice.

8. The words "in default of notice to the insurance office" mean in default of notice of appointment of trustees of the policy money. But during the insured's life where there are no trustees, notices of assignments and charges must, it is conceived, be given to the office, there being no one else to receive them, and the office must record and acknowledge them as in case of an ordinary policy. No other notice seems possible. Nevertheless the office may pay the money to the trustees thereof when appointed, or, if none, to the insured's personal representatives, but should in each case hand over copies of the notices.

Stamp.

9. Assuming the policy to have no money value, no settlement stamp beyond 10s. is payable, there being no provision made for keeping up the policy (see 33 & 34 Vict. c. 97, s. 124).

In whom policy vests.

10. The section does not expressly authorize the appointment of trustees of the policy, but only trustees of the money payable under

the policy. If no trustee is appointed, the policy being in the name of the insured vests in him, which appears unavoidable, there being no provision in the Act vesting it in any other person.

11. If trustees are appointed it is not stated that the policy is to vest in them, but their receipts are made a discharge for the policy money, consequently under the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), they have a legal right to sue on the policy, if notice is given according to s. 3 of that Act, and this seems in effect to vest the policy in them in the same manner as an assignment on trust.

12. If the policy names trustees it does not seem necessary to the effectual appointment of such trustees that the insured should sign the policy, but he or she must sign any separate writing appointing trustees.

General effect of this s.

13. Having regard to the other provisions of the Act, the effect of this s. seems to be only to render unnecessary a deed assigning the policy to trustees upon trust, and (see *Holt* v. *Everall*, 2 Ch. D. 273) to prevent the settlement in case of a trader from coming within s. 91 of the Bankruptcy Act, 1869, or s. 47 of the Bankruptcy Act, 1883 (see s. 152 of that Act).

Effect of policy for benefit of wife and children under Act of 1870.

Under the M. W. P. A., 1870, s. 10 (which is nearly the same as s. 11 of this Act), a policy effected by a married man for the benefit of his wife and children operates to give the money to the wife and children as joint tenants: *Re Seyton*, *Seyton* v. *Satterthwaite*, 34 Ch. D. 511, dissenting from *Re Adam*, 23 *ib.* 525.

Title of petition.

As to the title now of a petition for appointment of new trustees of a policy under M. W. P. A., 1870, see *Re Soutar*, 26 Ch. D. 236, where Pearson, J., seemed to think that s. 10 of the Act of 1870 is no longer in force, and he refused to appoint a single trustee though expressly authorized by that s.: *Re Howson*, W. N. 1885, 213.

Single trustee of policy not appointed.

Exchange of policy.

A policy effected under s. 10 of M. W. P. A., 1870, by a man for his own life for the benefit of his wife and children was authorized to be exchanged for another policy for a smaller sum, with premiums fully paid up, in *Schultze* v. *Schultze*, 56 L. J. Ch. 356.

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein-after contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such

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property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceedings shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Married woman's simple contract debt against her husband.

A married woman's debt against her husband is within the Statutes of Limitation: *Re Lady Hastings, Hallett* v. *Hastings*, 35 Ch. D. 94.

Injunction.

An injunction may be granted on the application of a married woman on her sole undertaking as to consequential damages (*Re Prynne*, 53 L. T. 45; W. N. 1885, 144). And a husband is not debarred from proceeding against his wife under such an undertaking by the prohibition in this s. in regard to his wife's torts: *Hunt* v. *Hunt*, 54 L. J. Ch. 289; W. N. 1884, 243.

Defamatory libel.

A married woman may not take criminal proceedings against her husband for a defamatory libel: *Reg.* v. *Lord Mayor of London*, 16 Q. B. D. 772.

Wife's antenuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts,

contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Debt as devisee.

The debt of a married woman as devisee of land settled on her for life on her marriage, is a debt "contracted by her before marriage," and her life interest is liable, notwithstanding restraint on anticipation: *Re Hedgely, Small* v. *Hedgely*, 34 Ch. D. 379.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property; Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid.

Suits for antenuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by

SS. 15, 16, 17.

contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Evidence in criminal cases.

Formerly (see *Reg.* v. *Brittleton*, 12 Q. B. D. 266) in criminal proceedings a husband's evidence could not be received against his wife: but see now the M. W. P. A. 1884, s. 1.

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the Judge of the

County Court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the Judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a Judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same Judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the Judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

SS. 18, 19.

An inquiry was ordered under this s. in *Phillips* v. *Phillips*, 13 P. D. 220.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

This s. seems to cover in certain cases more than is necessary, and to be scarcely sufficient in others. So far as the preceding sects. apply to trust property, the express power to transfer the particular items of trust property here mentioned is not required, more especially as the married woman would not in most cases for the purposes of transfer be known to be a trustee. On the other hand, unless the preceding sects. do so apply, no provision is made for transfer of other kinds of trust property not mentioned in this s., as, for instance, land and choses in action. The s. seems useful as an express provision that a married woman, as personal representative of a deceased person, may transfer funds standing in the name of the deceased, and also funds standing *at the commencement of the Act* in her sole name of which she is trustee, or in her name jointly with others as trustees, to which cases ss. 6 and 8 do not apply.

By s. 24 the husband of a trustee, executrix, or administratrix, is freed from all liabilities of the wife in those characters, unless he has intermeddled with the trust or administration.

An order for payment to a married woman as executrix should contain the words "on her separate receipt": *Re Hawksworth*, W. N. 1887, 113.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or

S. 19.

income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Settlement by married woman, a trader, when void against creditors.

The last clause in this s., taken in connection with s. 1 (5), places a settlement or agreement for a settlement by a married woman trading separately from her husband within the principle of *Ex parte Bolland*, L. R. 17 Eq. 115.

Construction of settlement not altered.

This s. does not alter the construction of a settlement made before the Act. Thus a covenant therein by husband and wife, to settle all property of the wife except that given to her separate use will still include property not given to her separate use but to which under this Act she becomes entitled separately as a feme sole: *Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker*, *Christian* v. *Whitaker*, 34 Ch. D. 227.

Covenant to settle by husband alone.

And the same construction has been put upon a covenant by the husband alone to settle (*Hancock* v. *Hancock*, 38 *ib.* 78), the principle stated being that if the fund would be bound by the covenant in case the Act had not passed then by force of this s. the fund remains bound notwithstanding the Act, so that in all cases where the fund can be reduced into possession during the coverture, the covenant of the husband binds and takes away from the wife separate property acquired by her under the Act. The s. includes settlements "made or to be made," *i.e.*, either before or after the Act, and "whether before or after marriage," so that a husband can deprive his wife of her separate property under the Act by merely executing a voluntary covenant to settle it, and, as the nature of the settlement is not specified, it would seem that he need not even settle it on his wife or issue. It was this absurd result which mainly led to the decision (which has been disapproved of in the cases above quoted) of Chitty, J., in *Queade's Trusts*, W. N. 1884, 225; 33 W. R. 816. There the wife was an infant at the time of the settlement and could not be considered in any way as an assenting party to the settlement, and it was held that her separate property under the Act was not bound. Upon the other construction s. 19 enables the husband to repeal s. 5 and take away all property given to his wife by the Act, and there is the further anomaly that though the husband is deprived of his old rights by the Act, yet the rights of persons who claim only through him are preserved. If the husband himself would have no title, how can his covenant confer a title on others, perhaps even on himself?

SS. 19, 20, 21, 22.

The decision in *Queade's Trust* seems a reasonable solution of the difficulty, namely, that s. 19 merely says *the construction* of the settlement is not to be affected and does not apply except where the wife is bound by, or has assented to, the settlement. At present the actual decisions do not go beyond this. In the case of *Re Armstrong, Ex parte Boyd* (21 Q. B. D. 270) Lindley, L.J., said the words "interfere with or affect any settlement" mean "invalidate or render inoperative any settlement." It would seem therefore that there must be a settlement valid and operative against the wife in order to deprive her of her separate property under the Act.

Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

31 & 32 Vict. c. 122.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired

while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

How far Act of 1870 preserved.

The effect of this s. seems to be to preserve the Act of 1870 as to all policies effected under it, and therefore the office must for its protection require the appointment of a trustee according to that Act and cannot safely pay to any other trustee or to the personal representative of the person whose life is assured, as provided by this Act: but see *Re Soutar*, 26 Ch. D. 236.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Administration bond.

It is not necessary now that the husband of a married woman should join in the administration bond on grant to her of letters of administration: *Re Ayres*, 8 P. D. 168.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

CHAPTER III.

RULES AS TO PROBATE OF WILLS OF MARRIED WOMEN AND WILLS OF WIDOWS MADE DURING COVERTURE.

AMENDED RULES, ORDERS, and INSTRUCTIONS for the REGISTRARS of the PRINCIPAL PROBATE REGISTRY and for the DISTRICT PROBATE REGISTRARS, in NON-CONTENTIOUS BUSINESS. (29th March, 1887.)

Rule 15 of the Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry in non-contentious business, dated 30th July, 1862, and Rule 18 of the Rules, Orders, and Instructions for the District Probate Registrars in such business, dated the 27th January, 1863, are respectively repealed, save so far as concerns anything done or proceeding taken in accordance with them, and in place of the said Rules it is ordered that the following Rules shall take effect:—

Rules 15 and 18. In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor or other person authorized in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next-of-kin of the testatrix in case of a partial intestacy.

The forms of instruments annexed to the before-mentioned Rules, Orders, and Instructions for the Registrars of the Principal Probate Registry, numbered 12, 13, and 14, and in the Rules, Orders, and Instructions for the District Probate

Registrars, numbered 13, 14, and 15, and thereby directed to be adopted as nearly as the circumstances of the case will allow in respect of the wills of married women, shall cease to be adopted in respect of such wills, except so far as the same may be applicable to oaths sworn before these Rules and Orders take effect, and also except so far as the same may be applicable to any second or subsequent grants required to complete the representation in cases where limited or special grants have already issued.

Effect of new probate rules.

NOTE.—These rules seem to have been issued on the ground stated by Butt, J., in *Re Price* (12 P. D. 137, 138), that a married woman is now in the same position as a *feme sole*, and the limited probate is no longer necessary. But, as will be seen above, p. 183, it has been decided in *Re Price, Stafford* v. *Stafford* (28 Ch. D. 709) that the will of a married woman made during coverture does not operate on property acquired after the coverture. If this is correct, the old practice of granting probate limited to what she had power to dispose of and what she had disposed of by the will seems still necessary. Under the new rules the general probate granted of a will made during coverture enables the executors appointed by that will to receive assets to which they are not entitled, namely, those of which the married woman having become a widow was entitled at common law, and which are properly payable only to the common law personal representative. The result is to deprive the next of kin of their right to take out letters of administration. The new rules cannot alter the devolution of the personal estate beneficially on the next of kin (see per Stirling, J., in *Re Lambert, Stanton* v. *Lambert* (39 Ch. D. 626, 635). But Kay, J., held that the husband suing the executor for sums which his wife had no power to dispose of by her will, must treat the will as valid, in which case he had no title. His proper course was to take proceedings to recall the probate (*Smart* v. *Tranter*, 40 Ch. D. 165). But then probate must after all be issued in the old form, the husband taking out letters of administration.

PART V.

CHAPTER I.

THE SETTLED LAND ACTS, 1882 TO 1887.

SUMMARY OF THE ACTS.

General purpose of Act of 1882.

THE general purpose of the Settled Land Act, 1882, is to give to an owner for the time being, having a beneficial interest in land under a settlement, whether the subject of settlement be an estate in fee simple or a less estate, power to dispose of or deal with the land or the estate or interest therein which is settled, so as to turn it to the best account, in the same manner as if he were a prudent owner absolutely entitled to the subject-matter of the settlement, and having complete power of disposition; care being at the same time taken to preserve the *corpus* of the property for the benefit of the successors in title of the owner for the time being.

Commencement.

Part I. of the Act provides that the Act is to commence after the expiration of the year 1882, and is not to apply to Scotland. Part II. gives a definition of the word "settlement," which is to include past as well as future settlements, and of the words "settled land." Sect. 2 includes not only the fee simple when the fee simple is the subject-matter of settlement, but any estate or interest in land which is the subject of a settlement: s. 2 (3).

Powers to whom given.

The scheme of the Act is first to give all the necessary powers to a tenant for life under a settlement, tenancy for life being the most usual form of limited ownership, and then, by s. 58, the powers so given are extended to those other forms of limited ownership which are generally considered to place a person in the position of

a landowner; ss. 60–62 provide for the special cases where the limited owner is an infant, a married woman, or a lunatic.

The powers of the Act are conferred on a tenant for life "beneficially entitled to possession" of the land: s. 2 (5); and "possession" includes receipt of income or rents and profits, so that a tenant's lease does not prevent a tenant for life from being in possession within the meaning of the Act: s. 2 (10) (i.). The Act (s. 63) contains separate provisions for the case of a tenant for life not entitled to rents and profits as such, but still entitled under a settlement by way of trust for sale to the income of the land until sold, as representing the income to be derived from the proceeds of sale. By the S. L. A., 1884, s. 7, an order of the Court is required to enable the exercise of the powers conferred by s. 63, and naming the person to exercise those powers. Until an order is made the trustees continue competent to sell under their trust.

The working of the Act rests entirely with the tenant for life. The trustees of the settlement for the purposes of the Act, except when acting for an incapacitated tenant for life, have no powers except to consent to sale of the mansion house (s. 15), and are mere depositaries of money.

Resort to the Court.

Where resort to the Court is necessary, as must occasionally happen, the Court prescribed is the High Court of Justice (s. 2 (10) (ix.)), Chancery Division (s. 46), but jurisdiction is also given to County Courts (s. 46 (10)) in the case of land, money, investments, or chattels not exceeding £500 in capital value, or, in the case of land, not exceeding £30 in annual rateable value.

Nature of powers.

The powers conferred by the Act include all powers usually inserted in settlements of real estate, and also many additional special powers not generally found in settlements; but, unlike the powers usually conferred by a settlement for dealing with the *corpus* of an estate, the powers conferred by the Act can in every case, except one (s. 15), be exercised by the tenant for life, or other

person in the same position as a tenant for life, at his own discretion, thus obviating the necessity for obtaining the concurrence or consent of trustees, which sometimes operates as a hindrance to the exercise of settlement powers. Where there is no competent person holding the position of a tenant for life, then the powers of the Act are exercisable by trustees, and it is always possible to obtain the appointment of trustees where there is any one interested in making an application to the Court for the purpose.

Preservation of capital.

To secure preservation of the capital money arising on a sale or otherwise, the tenant for life has a choice (s. 22) to procure the money to be paid either to trustees or into Court; but neither these trustees nor the Court have any voice in the mode or terms of the sale; they are only called into action after the sale is effected, and then only for the purpose of acting as depositaries of the proceeds of sale until applied in a manner authorized by the Act. Where there are trustees of the settlement, or where trustees can be procured to act for the purpose of receiving capital money, or where there is no money to be received, as on a simple exchange or a lease, resort to the Court is not necessary. If there be trustees of the settlement who refuse to receive capital money, the Court can appoint other trustees for the purposes of the Act (s. 38), so that, unless specially desired, payment into Court of capital money can generally be avoided; but in every case, unless otherwise provided in the settlement, there must be at least two trustees, either appointed by the settlement or otherwise, or one trustee only if the settlement so permits, upon whom notice is to be served (s. 45), but the trustees may by writing under hand waive notice (S. L. A., 1884, s. 5 (3)). The existence of these two trustees, or a sole trustee where permitted by the settlement (though they or he may be wholly passive), is necessary before the tenant for life can properly make any disposition under the Act. As no trustee of the settlement incurs any personal responsibility, except for the safe custody of money which he

actually receives (s. 42), there can in general be no difficulty in procuring persons to act.

Reinvestment.

The same principle applies to the application, on a reinvestment or otherwise, of money in hand representing corpus. Where land is purchased or any other investment made, the trustees have no voice in making the purchase or investment. They are bound to pay the purchase-money or make the investment by direction of the tenant for life (s. 22 (2)), and are not in any way responsible for the propriety of the purchase or of any other investment, provided it appears to be within the terms of the Act or the settlement (s. 42). Where capital money is to be applied for improvements authorized by the Act, the application may be either on consent of the trustees or of the Court (s. 26), and where the consent of the trustees is required they are freed from responsibility by a certificate of the Land Commissioners or of a competent engineer or able practical surveyor, or by an order of the Court (s. 26 (2)), so that the responsibility of trustees is confined to seeing that any given transaction appears on the face of it to be a transaction authorized by the Act. They are free from all liability in respect to the propriety of the transaction, except where they approve a scheme for the execution of improvements under s. 26, on which, as a matter of course, they would obtain proper professional advice, and thereby practically free themselves from liability.

The particular powers conferred by the Act are as follows :—

What powers given.

Part III. of the Act enables dispositions of land by Sale, Enfranchisement, Exchange, or Partition. Part IV. enables the grant of various leases for agricultural, mining, and building purposes, of the kinds usually authorized by settlements, and also enables other grants in the nature of leases to be made with the consent of the Court. Part V. contains general provisions applicable to any of these modes of disposition and to the case of a settlement of an undivided share of land, but it requires any sale or lease of the principal mansion house and demesnes,

and any lands usually occupied therewith, to be made with the consent of the trustees of the settlement or the Court.

Application of capital.

Part VI. provides for the application of capital money when the object is to re-invest it in land or securities (s. 21), and the application must be made by the direction of the tenant for life, or, in the absence of such direction, by the trustees, subject to any consent required by the settlement (s. 22 (2)). The power to re-invest includes application in payment of incumbrances, redemption of land-tax and quit-rents, purchase of tithe rentcharge, and interim investment, and in the case of interim investment includes investments which trustees are authorized by law to make. Besides the modes of investment specified in the Act any other investment authorized by the settlement may be made (s. 21 (xi.)). An investment in land out of England or Wales cannot be made with money arising from sale of land in England or Wales unless expressly authorized by the settlement (s. 23).

Improvements.

Part VII., taken with s. 21 (iii.), provides for the application of capital money in effecting improvements on the unsold portion of an estate. The list of improvements authorized is very large and seems to include all improvements more or less permanent, except the building or repair of a mansion house, which a prudent owner would wish to effect. By s. 30 the improvements to which the Improvement of Land Act, 1864, applies are extended so as to include all improvements mentioned in this Act, thereby enabling money to be borrowed under that Act for all the improvements specified in this Act. The mode of procedure under the Act of 1864 is also simplified (s. 64 and schedule). Some kinds of improvement, as laying down to permanent pasture, were omitted on the ground that when made they would be liable to immediate re-conversion into income, but are now included by the Agricultural Holdings Act, 1883. By s. 28 the tenant for life is put under an obligation to maintain and keep in repair improvements. There may

sometimes be no one inclined to enforce the obligation, but the representative of the tenant for life would after his death be liable for the neglect.

Contracts.

Part VIII. enables the tenant for life by contract to bind his successor in respect to all dealings capable of being effected under the Act, so that where time is required to complete a transaction, as in case of an agreement to grant building leases, the person dealing with the tenant for life is made as safe by a mere contract as if he were dealing with an owner in fee simple.

Other capital money.

Part IX. contains provisions as to special cases of money representing capital, namely, money in Court or in the hands of trustees arising from dealings otherwise than under this Act; money arising from sales of reversions, or limited interests, or from sale of timber; money required for protection of the estate by legal proceedings; and money arising by sale of heirlooms, the sale of which is enabled by the Act (s. 37).

Duties, &c., of trustees.

Part X. deals with the duties and liabilities of trustees. The protection afforded to a trustee is very full. His only active duties are—to consent to a sale of a mansion house (s. 15), to approve a scheme for improvements (s. 26), to receive or pay money, and by direction of the tenant for life (s. 22 (2)) to make interim or other investments. He is not bound to take proceedings in reference to any dealing of which notice is given to him. He is safe in acting as regards the execution of a scheme on a certificate of the Land Commissioners, or of a competent engineer, or able practical surveyor, or on an order of the Court (s. 26 (2)); he is also safe in adopting any contract under the Act made by a tenant for life for purchase, enfranchisement, exchange, partition, or lease, and in accepting any conveyance which appears correct on the face of it, and in paying by direction of the tenant for life any money which appears to be paid in accordance with the Act (s. 42), or which, in the case of improvements, is authorized by the proper certificate or by order of Court.

Procedure.

Part XI. deals with procedure before the Court, to

which applications may be made either by petition, or by summons, and the Court is enabled to direct payment of costs and expenses, and the raising of the amount out of the settled land.

Powers not capable of restriction.

The general effect of Part XII. is that the powers of the Act are personal to the tenant for life under the settlement. He cannot contract himself out of the Act, nor can he transfer his powers to any one else, but he cannot exercise them so as to defeat a purchaser or mortgagee deriving title under him, except that, as against his own assignee, his powers of leasing at the best rent without fine continue so long as he remains in possession. Nor (s. 51) can the settlor insert in the settlement any provisions tending to prevent a tenant for life from exercising the powers conferred by the Act. But though the settlor cannot restrict, he may (s. 57) enlarge these powers. He may, for instance, make unnecessary the notice to trustees of any intended dealing, or extend the powers of leasing, or the purposes for which capital money may be applied. All additional powers take effect as if conferred by the Act, so that there will be only one uniform mode of exercising settlement powers.

To whom powers given.

Part XIII. specifies the several persons who, as well as tenants for life, are to have the powers given by the Act to a tenant for life, and it may be said generally that all owners of an estate less than the fee simple are here included, except a dowress and a lessee at a rent, including even tenants in tail who by Act of Parliament are precluded from barring their estates tail, but except tenants in tail of estates purchased with money granted for the purpose by Parliament.

Disabilities.

Part XIV. provides for the case of limited owners under the disability of infancy, coverture, or lunacy. Part XV. provides for the case of settlements by way of trust for sale where the tenant for life is entitled to the income of the proceeds of sale, and not to the possession or income of the land as such. But the powers given by that Part to a tenant for life are not to be exercised without the leave of the Court under The Settled Land

Act, 1884. Part XVI. deals with repeals, and Part XVII. with the application of the Act to Ireland.

The Settled Land Act, 1887, enables capital money to be applied in re-purchasing a terminable or perpetual rentcharge created under any Act of Parliament in order to raise money for executing improvements authorized by s. 25 of the Act of 1882. Act of 1887.

From this short sketch of the contents of the three Acts, it will be seen that, except in the particular case of estates purchased with a Parliamentary grant of money, and except the sale or lease of the principal mansion-house and demesnes and lands usually occupied therewith, to which the consent of the trustees of the settlement or of the Court is required, every space of land in England, Wales, and Ireland, to the income of which any person in his private capacity is entitled as beneficial owner, may now at his sole will be sold or otherwise dealt with by him in nearly every mode in which a prudent owner would wish to deal, except that he cannot appropriate to his own use money representing capital. It can now no longer be fairly alleged that by reason merely of the existence of family settlements, land is prevented from being utilised by means of sale or lease for the benefit of the general public. The number of cases in which there is no person presently entitled beneficially in possession, and therefore no person to sell, will be very few. Also, under The Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), the incumbent of any benefice can procure a sale of any Glebe, and investment of the proceeds in the name of the Ecclesiastical Commissioners. The question remains whether provision should not be made for effecting within a given time a sale of the land of all public, ecclesiastical, and charitable corporations, and of all trustees for charitable purposes (by means of whose ownership a large amount of land is held on what are in fact trusts in perpetuity), only so much being retained as may be necessary for the purposes of the particular institution, as the site of a parsonage, hospital or school. This would be merely a return to the General result.

ancient, rigorous, and right policy of the law against the "dead hand." In very few cases would the objects of a charitable or public trust be injured in the present. The income of the proceeds when invested would generally be greater than the income of the land sold, and the possible increase in the value of the land for the benefit of the trust is clearly not a matter to be taken into consideration as opposed to the general interest of the Public.

CHAPTER II.

THE SETTLED LAND ACT, 1882.

45 & 46 VICT. c. 38.

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon. [10th August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

SS. 1, 2.

PRELIMINARY.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

II.—DEFINITIONS.

DEFINITIONS.

Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust

S. 2. DEFINITIONS.

for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

Settlement.

The definition of "settlement" here given is rather more full than that in the Settled Estates Act, 1877 (s. 2), but is in effect the same, except the words in that Act "including any such instruments affecting the estates of any one or more of such persons exclusively." The omitted words might have enabled an estate for life or other partial interest under a settlement to be sold separately. The effect of the definition in this Act appears to be that all the instruments engrafted on the settlement of a given interest must be taken as forming part of one settlement. Thus a disentail and resettlement of a remainder in tail would form with the original settlement, one settlement (*Wheelwright* v. *Walker*, 23 Ch. D. 759).

Derivative settlements.

Where settlements are made by persons of their interests in remainder the original settlement alone remains the settlement for the purposes of this Act: *Re Knowles' S. E.*, 27 Ch. D. 707. But where a base fee is settled for value and afterwards enlarged by disentail so that the settlement comprises the fee simple, the settlement and deed of disentail would, it is conceived, together constitute the settlement for the purposes of this Act.

Pin-money.

Where a tenant for life on his marriage or for valuable consideration creates a charge of pin-money for his wife without power to anticipate, it is conceived that this may properly be taken as part of the settlement and not an ordinary charge which the tenant for life cannot defeat (see s. 50 (3) (4)). But the right of the tenant for life to exercise all the powers of the Act should be expressly reserved. Pin-money created by the settlement itself can like any other limitation in the settlement be over-reached by an exercise of the powers of the Act.

Settlement by reference.

Where land is settled by reference to the limitations of an existing settlement the result is the same as if the limitations referred to were repeated. A separate settlement is created and capital money under the first settlement cannot be applied to pay charges on land comprised in the settlement made by reference. If this were not so a solvent estate under the first settlement might be made the means of paying the charges on an insolvent estate comprised in the second settlement. That the reverse proposition holds good is not so clear, and may depend on the terms of the second settlement. It seems clear that an order appointing trustees of one settlement would not constitute them trustees of the other settlement.

It is conceived that where two undivided shares are originally settled by separate deeds, the two deeds do not form one settlement.

The settlement need not be a legal settlement perfected by transfer of the legal estate. "Agreement" and "covenant to surrender" are expressly mentioned in s. 2 (1), and these bind the equitable "interest in the" land, s. 2 (3).

It is not necessary that all the limitations should be actually created by the instrument. It is sufficient that "under or by virtue of" the instrument, the land, *or any estate or interest in it*, stands limited to or in trust for any persons *by way* of succession. Thus a settlement within the meaning of the Act is created by conveyance on marriage to the use of the husband for life, with remainder to secure a jointure or portions, whether there is an express remainder in fee to the settlor or the fee results to the settlor. So also a settlement is created by a devise to A. for life, where the remainder in fee descends by lapse or otherwise to the testator's heir-at-law. This is made clear by subs. 2. But in the case first put, when the tenant for life is dead the remainder in fee becomes an estate in possession subject to the charge of jointure and portions, and the land then ceases to be "for the time being limited to or in trust for any persons by way of succession," and if the owner in fee desires to sell free from the charges, he can do so under the C. A., 1881, s. 5. But the land of an infant is throughout the infancy settled land (s. 59 of this Act).

What is succession.

An alternative limitation in fee creates an estate by way of succession (s. 58 (ii.)), but a devise in fee to trustees on trust for persons not ascertained, and taking only on a future event, would not (*Re Burdin*, 28 L. J. (Ch.) 840), at least where the devise carries the whole beneficial interest (see *Genery* v. *Fitzgerald*, Jac. 468, 1 Jarman on Wills, 653, 4th Ed.). Where the intermediate estate (as under a devise to A. in fee simple on the death of B.) descends, the case would be within s. 2 (2), taken along with s. 58 (ii.).

Alternative gifts.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

An instance where this s. applies is a devise to A. for life, there being either no devise of the remainder in fee, or there being a devise which lapses. This remainder is made an estate coming to the heir by virtue of the settlement. The settlement, therefore, creates a succession.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

"Land."

"Land" in Acts of Parliament passed since 1850, unless there are words to restrict the meaning, means "messuages, tenements, and hereditaments, houses and buildings *of any tenure:*" 13 & 14 Vict. c. 21, s. 4. Therefore leaseholds and copyholds, as well as freeholds, are included

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under the word land (compare *Wilson* v. *Eden*, 16 Beav. 153). By subs. (1) the settlement comprises the instrument or instruments under which land (*i.e.*, fee simple, copyhold, or leasehold) or any estate or interest in land (*i.e.*, in fee simple, copyhold, or leasehold) is settled, and by this subs. land (*i.e.*, the fee simple, the customary estate, or the term in land as the case may be), and any estate or interest (in the fee simple, customary, or leasehold estate) *which is the subject* of the settlement is referred to in the Act as the settled land. Only that estate which is the subject of the settlement is included under the term "settled land." Therefore a power given to lease the settled land is a power to lease the interest settled. In the case of settled leaseholds, for instance, it does not enable a lease to be made binding on the reversioner in fee, nor in the case of copyholds, a lease contrary to the custom, nor in the case of an equity of redemption (that is a settlement of land subject to a mortgage) does it enable a lease to be made binding on the mortgagee further than the original mortgagor could either under the C. A., 1881 (s. 18), or otherwise have bound such mortgagee. In all cases "the settled land" means the fee simple, if that is settled; it means the equity of redemption, if that is settled; it means the customary estate, if copyholds are settled; and the estate for a term of years or lives, if leaseholds for years or lives are settled. The powers conferred by the Act only bind persons deriving title under the settlement, and not any person having a title paramount to the settlement. This is plainly seen on considering the force given to a conveyance by s. 20, *post*.

"Settled land."

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

How long powers of settlement continue.

When the ultimate remainder in fee simple under a settlement has fallen into possession, whether subject or not to any charge under a settlement, as a jointure, the power of sale ceases (*Wolley* v. *Jenkins*, 23 Beav. 53; Sugden on Powers, 850, 8th Ed.), and the powers of the Act would also cease.

Where the tenant in tail in possession bars his estate tail the powers conferred by the Act are also gone. In both cases the land no longer stands limited by way of succession within s. 2 (1). So also where by surrender of a life estate the whole fee comes into possession. It is conceived that in the latter case s. 50 would not operate to preserve the powers of a tenant for life. His estate is not assigned; it has ceased.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

This definition taken in connection with subs. 10 (i.) and ss. 58 (1) (vi.) (viii.) (ix.) and 61 (2) (3) includes all equitable tenants for life (not being infants or of unsound mind) whether of the entirety or of an undivided share, and whether they are entitled or not to be let into possession, and the effect of the Act is that a mere equitable tenant for life, being adult and of sound mind, can convey the legal estate vested under the settlement in a trustee, that estate being the subject of the settlement (see s. 2 (3): see also note to s. 20). The case of an infant is provided for by ss. 59 and 60, and that of a lunatic, so found by inquisition, by s. 62.

Tenant for life.

"Entitled to possession" means that the right is immediate and not in reversion or expectancy: *Re Jones*, 26 Ch. D. 741, *per* Baggallay, L.J.; *Re Clitheroe*, 28 *ib.* 378, affirmed 31 *ib.* 135. The possession need not be personal, but may be the possession of trustees paying surplus rents and profits to a beneficial owner: *Re Morgan*, 24 Ch. D. 114; *Re Jones* and *Re Clitheroe*, *ubi sup.*, but the interest of the tenant for life must be in possession and not an interest to arise in him at a future day if then living under a conveyance then to be made: *Re Strangways*, *Hickley* v. *Strangways*, 34 Ch. D. 423. But where he would be entitled to surplus rents (if any) it is immaterial that there are none: *Re Atkinson*, *Atkinson* v. *Bruce*, 30 Ch. D. 605, 612; affirmed 31 *ib.* 577. See also *Re Hale and Clark*, 34 W. R. 624, W. N. 1886, 65.

What is "possession."

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

The effect of this subs. is that all persons having concurrent interests *under the same* settlement must join. It would be improper, for instance, to allow a tenant for life of one undivided moiety, to sell that moiety alone; he must join with the tenant for life of the other moiety in selling the whole, but cannot be compelled to join: *Camden* v. *Murray*, 16 Ch. D. 161. But if each undivided moiety is settled separately then neither moiety is the subject of the settlement made of the other moiety; each moiety is in itself settled land, and can be sold by the tenant for life thereof without the concurrence of the owner of the other: subss. 3 and 10 (i.).

Two or more.

A discretionary trust to pay rents during the life of A. to him or others does not constitute them together a tenant for life: *Re Atkinson*, *Atkinson* v. *Bruce*, 30 Ch. D. 605, affirmed 31 *ib.* 577.

Under this subs. where two undivided shares are comprised in the same settlement, and one has become either originally or by disentail vested in an owner in fee, while the other share is still the subject of a tenancy for life, the tenant for life of the settled share cannot sell that share without the concurrence of the owner in fee of the other share: see *Re Collinge's S. E.*, 36 Ch. D. 516; see also s. 19.

Undivided shares.

(7.) A person being tenant for life within the foregoing

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definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land or his estate or interest therein, is incumbered or charged in any manner or to any extent.

Who has the powers.

The powers conferred by the Act are given to the person who, under the settlement, is in the position of beneficial owner for life, subject to all charges or incumbrances, whether that ownership produces any fruit or not, and he cannot, except by surrendering his estate so as to put an end to it, divest himself of the powers (see s. 50 (1)). But the rights of an assignee for value cannot be defeated (s. 50 (3)), and his concurrence in the disposition is necessary, except to the grant of a lease under the Act where no fine is taken (s. 50 (3)), unless the assignee is in possession, and then his concurrence is necessary to the granting of all leases.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

Trustees of the settlement. Power to sell must be present power.

The power of sale referred to in this subs. is a present power, and not a power arising only at a future time: *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761; and may be a power exercisable only with consent of the tenant for life: *Constable* v. *Constable*, 32 Ch. D. 233. Those persons only are trustees for the purposes of the Act who either are appointed trustees or under the settlement have a present power of sale or of consent to or approval of the exercise of such a power. No other trustees are trustees within the Act. If there be no trustees appointed or no present power of sale, or if there be trustees of a power but they refuse to act, it is necessary to procure the appointment of trustees under s. 38.

Under settlements giving a present power of sale any sale, lease, &c., may be made in exercise either of the powers of the settlement or of the powers of the Act. If the Act be resorted to, the trustees with a present power of sale under the settlement, or the trustees appointed under s. 38, are the trustees for the purposes of the Act.

If for any reason it is preferred to make any sale, &c., under the powers of the settlement and not under the Act, the money received and liable to be re-invested in land, may nevertheless be applied in the same manner as if it arose under the Act (s. 33).

Trustees must have power as

The Vice-Chancellor Bacon in Chambers has treated this subs. as requiring that the trustees of the settlement, in order to be trustee

under the Act, be trustees of a power of sale of "the settled land proposed to be sold." The result is, that where a power of sale does not extend to the mansion-house, trustees must be appointed under s. 38, in order to enable a sale, if it can be made, under s. 15. But the wording of this subs. seems sufficient to make those persons trustees for the purposes of the Act who are trustees with present power of sale "of settled land," that is "of any land settled by the settlement."

to the land dealt with.

The principle of *Wheelwright* v. *Walker* would not, it is conceived, apply to prevent persons who have only power to sell at or above a certain price being trustees for the purposes of the Act. They are persons having a present power of sale, though only capable of being exercised on particular terms, but it might be held that they are such trustees only if the particular price be obtained.

Power to sell restricted as to price.

Trustees having power to sell only in consideration of a rent are not trustees for the purposes of the Act: *Re Morgan*, 24 Ch. D. 114, 115. It has been decided in Ireland that there must be a trustee willing to act: *Re Johnstone's Settlement*, 17 L. R. Ir. 172. There seems nothing in the Act to support this view, and it involves in every case of a lease exchange or partition where apparently proper trustees exist, the necessity for ascertaining whether they consent to act, though nothing is required to be done by them. Where there are no trustees within the definition of this subs. trustees must be appointed under s. 38.

Power to sell for a rent.

Appointment of trustees by Court.

In all settlements since the Act the proper course is expressly to appoint trustees for the purposes of the Act. It is unnecessary to insert powers similar to those contained in the Act; but in special cases larger powers may be required, and when contained in a settlement will operate under s. 57 as if conferred by the Act, so that all the powers conferred by the Act and the settlement taken together will operate as powers conferred by a single instrument, namely, the Act.

Powers in future settlements.

By s. 39 (2) the expression "the trustees of the settlement" is made applicable to the surviving or continuing trustees or trustee of the settlement for the time being, but this is subject to subs. (1) of that s., which prohibits payment of capital money to fewer than two persons as trustees, unless authorized by the settlement.

Single trustee.

If it is intended to authorize the payment of capital money to a single trustee, as was usual in settlements before the Act, express authority must be given.

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

The following are capital moneys under the Act, and should be paid to the settlement trustees or into Court under s. 22:—

What is capital money.

(1.) Money received on sale (which includes enfranchisement) or for equality of partition or exchange.

(2.) Fines on grants of leases under this Act (see S. L. A., 1884,

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s. 4), and fines on confirmation under this Act of leases, except fines on leases granted pursuant to a covenant for renewal (see note to s. 7 (2)).

(3.) Money raised by mortgage: s. 18.

(4.) Share of mining rent (three-fourths where tenant for life is impeachable for waste in respect of the minerals leased, otherwise one-fourth) unless the settlement provides to the contrary: s. 11.

(5.) Three-fourths of proceeds of sale of timber cut under s. 35, where the tenant for life is impeachable for waste in respect of timber.

(6.) Money paid for licenses to demise granted to copyholders, except where the license is authorized by the custom: s. 14.

(7.) Money paid for dedication of streets, &c., under s. 16.

(8.) Money paid into Court under the Lands Clauses Consolidation and other Acts, or in the hands of trustees and liable to be invested in the purchase of land to be settled as the settled land: ss. 32, 33.

(9.) Money in Court so liable, though not paid in under any of those Acts: *Clarke* v. *Thornton*, 35 Ch. D. 314.

(10.) Proceeds of sale of heirlooms: s. 37.

(11.) Money paid for varying or rescinding contracts for sale, exchange, or partition: s. 31 (1) (ii.).

Moneys belonging to tenant for life.

The following it is conceived are not capital moneys, but belong to the tenant for life:—

(1.) Money paid by a lessee as a consideration for acceptance of surrender of a lease (see note to s. 13 (1)).

(2.) Fines on the grant of leases pursuant to a covenant for renewal (see note to s. 7 (2)).

(3.) Money paid to the tenant for life as consideration for varying the terms of a lease under s. 31 (1) (iii.).

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

"Land." Tithes. Title of honour.

For a definition of "land" in Acts of Parliament passed since 1850 see note to V. & P. A. s. 1, p. 7. Tithes are "land" within this subs.: *Re Esdaile, Esdaile* v. *Esdaile*, 54 L. T. 637; W. N. 1886, 47. Also a title of honour descendible to heirs general or heirs of the body: *Re Rivett-Carnac's Will*, 30 Ch. D. 136, 139.

As to undivided shares, see notes to ss. 2 (6) and 19.

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes

delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

As to the exercise of the powers of the Court as regards land in the County Palatine of Lancaster, see s. 46 (8), (9); and as to the jurisdiction of County Courts under this Act see s. 46 (10), and as to its application to Ireland see s. 65.

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

See s. 48.

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Singular. Masculine. Month.

(xi.) Person includes corporation.

For definitions of singular and plural, the masculine gender and month, in Acts of Parliament passed since 1850, see note to C. A. s. 2, p. 16.

SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

III.—SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

General Powers and Regulations.

General Powers and Regulations.

Powers to tenant for life to sell, &c.

3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

Meaning of land.

"Land" includes any "hereditament" (13 & 14 Vict. c. 21, s. 4, and s. 2 (10) (i.) of this Act), so that any beneficial easement or right attached to settled land as a right of way to other land may be sold so as to extinguish it, as well as an easement burdening the settled land.

Minerals.

The sale, exchange, or partition of minerals and surface separately is provided for by s. 17; the raising of money to pay for equality of

Mansion-house.

partition or exchange is provided for by s. 18. The principal mansion-house and the demesnes and lands occupied therewith cannot be sold

Undivided shares.

or leased without consent of the trustees or the Court, s. 15; and s. 19 contains special provision for an undivided share.

Easements.

The powers given by this s. are larger than the usual settlement powers. The power to sell an easement, right, or privilege over land could not before 1881 (see C. A., 1881, s. 62) be conferred under a settlement by conveyance to uses. Under the ordinary power to sell land, and in the absence of an express clause for the purpose, the surface could not be sold apart from the minerals (see *Buckley* v. *Howell*, 29 Beav. 546), and it was difficult and sometimes legally impossible to provide for all the restrictions and conditions required on sales of building land and minerals. This s. and ss. 4, 17, 19, and 20, provide for all ordinary cases of sale, exchange, or partition, but no power is given to sell a right or interest not capable of alienation by a tenant in fee simple: *Re Rivett-Carnac's Will*, 30 Ch. D. 136. Further special powers may be added, and will take effect as if given by the Act: s. 57.

When sale restrained.

A tenant for life, proposing to sell at a price below that offered by a remainderman, was restrained from selling otherwise than by public auction without communicating to the remainderman any offer made: *Wheelwright* v. *Walker*, 31 W. R. 912; W. N. 1883, 154.

But the tenant for life and the trustees under a will empowering the trustees to sell at the request of the person or persons entitled to the actual freehold, will not be restrained from selling the estate on merely speculative evidence adduced by the remainderman that the property is likely to increase in value: *Thomas* v. *Williams*, 24 Ch. D.

558. See also note to s. 53. A tenant for life may sell from mere caprice, or from dislike to the remainderman, or for any similar motive, but he must sell at the best price: *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540. He may sell without the sanction of the Court notwithstanding that an administration decree has been made before or since the commencement of the Act (*ib.* 531, 540), but not it seems where an order for sale has been made under the Settled Estates Act, 1877 (*Re Barrs-Haden*, 32 W. R. 194; W.N. 1883, 188); and where powers of leasing have been granted under that Act the leasing powers under this Act cannot be exercised without an order suspending the earlier powers: *Re Poole*, 32 W. R. 956; *Re Barrs-Haden*, *ubi sup.* It seems therefore that an actual order for sale in an action, as distinguished from a mere administration order, prevents a sale under this Act. In *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341, Chitty, J., seemed to say that a tenant for life can sell "without prejudice" to the mortgagees on his life estate, and therefore subject to and with a deduction for such mortgages. But the power under this subs. is to sell "the settled land," which is defined by s. 2 (3) as "land and the estate or interest therein the subject of the settlement," that is to say, the whole estate without deduction for the mortgage. Then s. 50, after providing that the powers of a tenant for life shall continue after assignment of his estate for life, enacts "that the s. shall *operate* without prejudice to the assignee," not that a sale or other disposition may be made subject and without prejudice to the assignment, which would be a new power not previously given. The mortgage may be provided for and a discharge obtained under s. 5 of the C. A., 1881, or the purchaser may pay the full price without reference to the mortgage and accept an indemnity. In this way the power of the tenant for life can be exercised without prejudice.

Motive of sale.

Sale after decree.

Incumbrances on life estate.

The Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72) s. 11 (*infra*, Chap. V.), affords facilities for selling, exchanging, and leasing settled land for the purposes of that Act, and the improvements on which capital money under this Act may be expended are to include dwellings for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

48 & 49 Vict. c. 72, s. 11.

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

The seignory of freehold land is an actual estate in fee simple left in the grantor after a subinfeudation to a freehold tenant made before the

Seignory.

S. 3.

SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

General Powers and Regulations.

statute *Quia emptores*, and carrying with it the quit rents and services. When the tenant of the manor is a copyholder the fee simple estate is a reversion, the copyholder being in law a mere tenant at will. The effect of a conveyance of the seignory to the freehold tenant is necessarily to cause a merger of his subinfeudation tenure in the seignory or estate of the superior, and thus to effect an enfranchisement, that is, an extinction of the services of the inferior.

It will be observed that enfranchisement is in this subs. treated as a sale, and is consequently included under the term "sale" used subsequently in the Act, except in s. 55 (2), where enfranchisement includes enfranchisement under a power in a settlement.

Enfranchisement included in "sale."

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

Tenure not material.

As "land" means land of any tenure, this subs. includes a power to exchange freehold for leasehold or copyhold, and *vice versâ*, and it also includes an easement in existence.

Exchange of easements.

Though a sale of an easement to be newly created (as a right of way) out of settled land can be made under subs. (i.), it does not seem capable of being newly created on an exchange (see s. 20 (1) and note). Thus an existing right of way to land included in the settlement could be conveyed in exchange for another right, but a right of way over settled land could not be created in exchange for another similar right released, but the transaction may be effected by a sale on each side. This does not apply to easements for mining purposes, as to which express provision is made by s. 17.

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

See this subs. supplemented by s. 19.

Ancillary powers.

The following powers in the Act are ancillary to those conferred by this s.

(1.) To contract: s. 31.
(2.) To substitute securities: ss. 5, 24 (4).
(3.) To raise money for enfranchisement or for equality of exchange or partition: s. 18.
(4.) To concur in regard to undivided shares: s. 19.
(5.) To deal separately with surface and minerals: s. 17.

(6.) For trustees to receive, s. 22, and give receipts for money not paid into Court: s. 40.

(7.) To convey land disposed of: ss. 20, 55 (2).

(8.) To settle land acquired: s. 24.

* Notice of intention to sell, &c., must be given by the tenant for life under s. 45, as amended by S. L. A., 1884, s. 5, but a person acting in good faith is exempted from inquiry whether notice has been given, s. 45 (3) of this Act. Sect. 53 of this Act places the tenant for life in the position of a trustee in exercising the powers of the Act.

* Notice.

Regulations respecting sale, enfranchisement, exchange and partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

England.

"England" in Acts of Parliament includes Wales and the town of Berwick-on-Tweed (20 Geo. 2, c. 42, s. 3), but not in deeds or other documents.

SS. 5, 6.

SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

Special Powers.

Transfer of incumbrances on land sold, &c.

Special Powers.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

Incumbrance.

"Incumbrance," within the meaning of this s., includes a charge having priority to the settlement, although no money has been actually raised under it, but not a charge created by, or in exercise of any power in, the settlement, on which no money has been actually raised. The last-mentioned charge is, but the other is not, overreached by the conveyance of the tenant for life under s. 20 (2). A substituted security on any other part of the settled land may be given under this s. for any charge not overreached; see also s. 24 (4).

LEASES.

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Power for tenant for life to lease for ordinary or building or mining purposes.

IV.—LEASES.

General Powers and Regulations.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years.

Tenant for life's power of leasing.

As before stated, "land" includes land of any tenure (13 & 14 Vict. c. 21, s. 4), therefore this s. applies to copyholds and leaseholds as well as freeholds, but by s. 2 (3) this Act applies only to "the estate or interest which is the subject of the settlement," and does not authorize the granting of any lease not warranted by that estate or interest. A tenant for life of leaseholds therefore cannot grant a lease extending beyond the term which is the subject of the settlement, nor can a copyholder grant a lease not warranted by custom or permitted by license.

On the same principle, though the powers of leasing given by this s. to a tenant for life are properly larger than the powers given to a mortgagor by s. 18 of the C. A., 1881, still as against a mortgagee of the fee simple whether prior to the settlement or not the powers given by s. 18 of that Act can alone be exercised. But the mortgagee of the tenant for life if not in possession stands in no better position than the successors in title, except that as against him no lease at a fine can be made, but he is bound by any other lease: s. 50 (3).

Larger than mortgagor's power.

Leases may be made by an equitable as well as the legal tenant for life, so as to create a legal term where the legal estate is the subject of the settlement (s. 20), and the rent and the benefit of the covenants become annexed to and run with the legal reversion (C. A., 1881, s. 10).

Lease by equitable owner.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

Regulations respecting leases generally.

The effect of this subs. is that every existing lease must be surrendered unless it is within one year of expiring. See *Re Farnell*, 33 Ch. D. 599.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

"Month" means calendar month: 13 & 14 Vict. c. 21, s. 4. Month.

"Rent" includes reservations in kind as well as money, s. 2 (10) (ii.) Rent.

The value of a surrendered lease may be taken into account in fixing the rent of a new lease, s. 13 (5). By S. L. A., 1884, s. 4 a fine paid for a lease under this Act is capital money unless the contrary is provided.

Value of surrendered lease.

Where at the date of the settlement the settled land is subject to a lease containing a covenant for renewal on a fine, the tenant for life will be entitled to receive the fine for his own use. He is bound to grant the lease independently of this Act, and s. 12 (ii.) enables him to create a legal term without the aid of the Court. The fine is a casual profit similar to the fines and heriots payable to the lord of a manor (*Brigstocke* v. *Brigstocke*, 8 Ch. D. 357), but the case is different where a lease is originally granted under this section at a fine (see S. L. A., 1884, s. 4). On the construction of a settlement, a tenant for life may be entitled to all fines (*Simpson* v. *Bathurst*, L. R. 5 Chanc. App. 193).

Fine.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on

SS. 7, 8.

LEASES.

General Powers and Regulations.

the rent not being paid within a time therein specified not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

Statement of fact or calculation.

A statement of fact, indorsed on a lease, and signed by the tenant for life, that money covenanted in the lease to be laid out by the lessee has been laid out accordingly, and a statement of calculation recited in a lease that the rent thereby reserved does not exceed one fifth part of the full annual value of the land comprised therein with the buildings thereon when completed (see s. 8 (3) (iii.)) are instances of statements within the meaning of s. 7 (5).

Contract to lease.

Notice.

As to the power of a tenant for life to contract for leases, see s. 31 (1) (iii.) (2). And as to notice of intended leases, see s. 45 as amended by S. L. A., 1884, s. 5.

48 & 49 Vict. c. 72, s. 11.

For facilities given by the Housing of the Working Classes Act, 1885, s. 11, for leasing settled land for the purposes of that Act, see last note to s. 3 (i.) of this Act.

Building and Mining Leases.

Building and Mining Leases.

Regulations respecting building leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots,

the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

A lease of part, not built upon, of land comprised in a building agreement, is not a building lease within this s.: *Re Sabin*, W. N. 1885, 197.

Option to purchase.

In *Re Cardigan*, *Cardigan* v. *Curzon-Howe* (1885, C. No. 5464), Chitty, J., authorized a tenant for life to grant building leases for 99 years, with an option to purchase the fee simple within five years at 25 years' purchase. It is difficult to see how the option to purchase is authorized by the Act. It has been decided that directors of a company may not give such an option: *Clay* v. *Rufford*, 5 De G. & S. 768; nor an administrator: *Oceanic Steam Nav. Co.* v. *Sutherberry*, 16 Ch. D. 236.

Regulations respecting mining leases.

9.—(1.) In a mining lease—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

Rent variable with market price.

It has been recently found convenient to make the rent vary with the market price of the minerals, which is a case not provided for by this subs.

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the

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LEASES.
Building and Mining Leases.

rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with mining purposes.

Variation of building or mining lease according to circumstances of district.

10.—(1.) Where it is shewn to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

For form of summons under this s. see Rules under S. L. A., Forms III., IV., and V., *infra*, Chap. V.

A general authority to grant building leases for 200 years, of the estate of an infant tenant in tail of the age of eighteen years, was refused in *Cecil* v. *Langdon*, 54 L. T. 418.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Part of mining rent to be set aside.

Where under this s. a portion of the rent is to be set aside as capital money, the lessee must, it is conceived, pay it to the trustees or into Court. This has been the course taken in orders under the S. E. Acts of 1856 and 1877, which have usually directed payment to the trustees (Seton, 1490, 4th ed.). The trustees should be made parties to the lease, and their portion of rent should be made payable to them.

Rent set aside is payable to the trustees.

The portion of rent set aside under this s. is in effect the consideration paid by the tenant for life for the privilege of granting the lease for sixty years. But the Act does not affect any of his common law rights, as tenant for life, to open and work mines if he is unimpeachable for waste, and to work open mines if he is impeachable for waste. It will probably become the practice to provide expressly against capitalising any part of a mining rent, thus placing the tenant for life in the same position as under a settlement with the usual leasing powers.

The words "where the tenant for life is impeachable for waste in respect of minerals" do not apply to the case of a tenant for life of open mines. A tenant for life may work open mines although impeachable for waste (*Clavering* v. *Clavering*, 2 P. Wms. 388; *Viner* v. *Vaughan*, 2 Beav. 466), consequently on a lease under the Act of such mines, one-fourth only of the rent is required in any case to be set aside. The provision for setting aside is in effect the same as that in the S. E. A., 1877 (40 & 41 Vict. c. 18, s. 4 (3)).

Impeachable for waste in respect of minerals.

A tenant for life of the proceeds of sale under a trust for sale and entitled to the rents until sale, must set aside three fourth parts of the mineral rent under a lease of unopened mines: *Re Ridge*, *Hellard* v. *Moody*, 31 Ch. D. 504.

Tenant for life of proceeds of sale.

As to what is "a contrary intention" within the meaning of this s., see *Duke of Newcastle's Estates*, 24 Ch. D. 129.

Contrary intention.

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LEASES.

For a form of summons by a lessee for payment into Court of the part of the rents to be set aside under this s. see Rules under S. L. A., Form X., *infra*, Chap. VI.

Special Powers.

Special Powers.

Leasing powers for special objects.

12.—The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

"Predecessors in title" includes all predecessors, those prior to as well as those under the settlement. In like manner "successor in title" in s. 31 (2) includes a successor subsequent to as well as a successor under the settlement.

As to the effect of a contract of the kind mentioned in this subs. made before this Act, see *Davis* v. *Harford*, 22 Ch. D. 128.

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

Where a testator who has contracted to grant a lease dies, having devised the property in settlement, or where the land is leased with a covenant for renewal, the tenant for life could not, except under an express power for the purpose, give the lessee a legal term without the aid of the Court, to be obtained in an action by the lessee for specific performance. In *Cust* v. *Middleton* (3 De G. F. & J. 33) an Act of Parliament was thought necessary in order to carry into effect the contracts of the testator in the case first mentioned. The effect of subss. (i.) and (ii.) of this s. is to render an action unnecessary in either case.

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

Where a lease was void for some want of compliance with the power and the power required the best rent to be reserved it was sometimes impossible on account of building or improvements effected by the

lessee increasing the value to give him a valid lease on the terms to which he was justly entitled. This subs. now enables the proper lease to be granted, adopting the principle of the Acts 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17.

Surrenders.

Surrenders.

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

Acceptance of surrender by equitable tenant for life.

This s. appears to enable an equitable tenant for life having no legal reversion to accept a surrender of a term so as to merge it, just as s. 6 enables him to grant a lease creating a legal term, though he has no legal estate. He acts in each case under the statutory authority conferred by this Act.

Consideration for surrender.

Money paid to a tenant for life as the consideration for accepting the surrender of a lease belongs, as a general rule, to him absolutely. The rule is not expressly altered by this s., but will, it is conceived, still hold good as to all leases, whether made under the powers of the Act or otherwise, and notwithstanding the provisions of s. 53, this s. being merely in affirmance of the common law right of the tenant for life, and not conferring any new power. But it is conceived that where the surrender is one which an actual trustee would not be justified in accepting, the tenant for life could not retain for his own use the sum received (see note to s. 53). Thus, if there were a lease of five acres at £10 rent, and the tenant for life should under subs. (2) take a surrender of one acre, apportioning £9 as the rent of that acre, and leaving £1 only payable in respect of the other four acres, payment being made to him for so doing, this would be a clear breach of duty towards the remaindermen, and as the apportionment would be made under a power conferred by the next subs., it can scarcely be doubted that the tenant for life would be held liable as trustee for the sum received by him, and that it would be treated as capital money.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

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LEASES.
Surrenders.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

Subs. 5 enables the value of a lease beneficial to the lessee, which is surrendered, to be taken into account on the grant of a new lease. Under the ordinary power of leasing this could not be done, Sug. Powers, 787, 8th ed.

(6.) Every new or other lease shall be in conformity with this Act.

Copyholds.

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

Fine on licence, whether capital.

If the licence be granted on a fine, the question whether the fine is capital or casual profit must be decided on the same principle as in case of a fine on an ordinary lease under this Act (see n. to s. 7 (2)). If the licence is in accordance with the custom, it is not granted under this Act and the fine will be casual profit.

Effect of licence.

By a licence under this s. it is conceived that the copyholder can only grant a lease in all respects the same as a tenant for life could grant under this Act. If this were not so, an onerous lease, at a large fine, might be granted, and the succeeding lord would be prejudiced in case of forfeiture or escheat.

Act does not override custom.

Where the lord is restricted by custom from granting licences to lease beyond a certain term, as in *Hanbury* v. *Litchfield* (2 My. & K. 629), this s. will not enable him any more than a tenant in fee simple to override the custom by a mere licence. Notwithstanding the licence, a lease by the copyholder for a term longer than that allowed by the custom will be a forfeiture capable of being enforced by the next succeeding lord. Nor could the tenant for life by joining in the demise make a lease contrary to the custom, such lease being in the nature of an underlease and not a lease in possession, s. 7 (1). A lord entitled in fee simple might by joining with the copyholder grant a lease not warranted by the custom, but this, it is conceived, would be a lease by the lord, and release of his right by the copyholder, so that the reversion would be in the lord and not in the copyholder.

V.—SALES, LEASES, AND OTHER DISPOSITIONS.

Mansion and Park.

Restriction as to mansion-house, park, &c.

15. Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.

Meaning of mansion, &c.

On this s. the following points seem reasonably clear. Only one mansion-house on any settled land is within the restriction. Where there are two or more estates clearly distinct, though included in the same settlement, the principal mansion on each is within the restriction; the house on one estate cannot be said also to be on the other estate. Lands shewn to have been for many years farmed by tenants are clearly not within the restriction, but difficulty will occur sometimes as to woods kept in hand but within the boundary of a farm. They must until the contrary is decided be treated as within the restriction.

A residence and a few acres occupied therewith, and any house in London, must also, until the contrary is decided, be treated as within the restriction. The word "principal" does not probably imply that there must also be a "secondary" mansion, in order to bring the restriction into operation. But any difficulty can always be removed by the consent of the trustees or an order of the Court.

Sale of mansion, remainderman objecting.

As to the circumstances under which the Court will, under the S. E. A., 1877, authorize a sale of the mansion-house where the tenant for life is an infant, though a remainderman objects, see *Marquis of Camden* v. *Murray*, 27 Sol. J. 652.

Effect of express exception.

The fact that the mansion is expressly excepted from the power of sale given by the settlement will not prevent the Court from authorizing a sale: *Re Brown's Will*, 27 Ch. D. 179.

SS. 15, 16.

SALES, LEASES, AND OTHER DISPOSITIONS.

Mansion and Park.

* Mortgagee's consent.

† Provision in future as to mansion, &c.

Streets and open Spaces.

Dedication for streets, open spaces, &c.

* The consent of the mortgagee of the estate for life is of course necessary, s. 50 (3): *Re Sebright*, 33 Ch. D. 429.

† All future settlements should contain, as authorized by s. 57, an express provision either removing the restriction imposed by this s., or defining the house and land to which it applies.

For form of summons for leasing under this s., see Rules under S. L. A., Forms IV. and V.; and for sale, Forms VI. and VII. (Chap. VI. *infra*.)

Streets and open Spaces.

16. On or in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connection therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trust or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be enrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and

extent of the privileges and conveniences granted.

Dedication to the public

Dedication to the public is a term generally applied to the act of throwing roads open to the use of the public, but without the aid of this s. an effectual dedication could only be made by an owner of the fee simple. A dedication by a leaseholder or tenant for life in right of his estate does not bind the reversioner or remainderman: *Wood* v. *Veal*, 5 B. & Ald. 454; *Harper* v. *Charlesworth*, 4 Barn. & C. 591. This s. enables a tenant for life to bind those in remainder.

Different from conveyance.

A conveyance of land to trustees on trust for public purposes is not strictly a dedication to the public; it is the creation of a trust for charitable purposes (all public purposes being charitable purposes, see 1 Jarm. Wills 208, 4th ed.), and the deed of conveyance must be enrolled and otherwise perfected according to the provisions of the Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). A conveyance to a local authority or corporation can only be made where they are empowered by statute to acquire the land. They then acquire it as their own property and not as trustees, and the Act last mentioned does not apply. On a simple dedication to the public the freehold in the soil still remains in the person making the dedication (*R.* v. *Pratt*, 24 L. J. (M. C.) 113), unless by any statute affecting a particular locality it becomes transferred to a local authority. It is not necessary that a deed effecting a simple dedication to the public should be perfected as required by the Charitable Uses Act, it operates merely as evidence of the transaction, and not as a conveyance.

Conveyance to give effect to this s.

Sect. 55 (2) gives a general power to the tenant for life under which he may make any conveyance necessary for giving effect to the provisions of this s.

Cost of works under this s.

Expenses incurred in executing works under this s. may be raised by sale or mortgage under s. 21 of the S. E. A., 1877, or they may be paid for out of any money being or representing capital money under this Act: see ss. 21 (x.) 25 (xvii.) 32 and 33.

Surface and Minerals apart.

Surface and Minerals apart.

Separate dealing with surface and minerals, with or without wayleaves, &c.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

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(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

Surface and Minerals apart.

Under a power in a settlement easements could not formerly be granted as they could not be raised by way of use. This difficulty has been removed by the C. A., 1881, s. 62; but no question of the kind can arise under this Act, which gives a common law power to convey the fee independently of the Statute of Uses.

Grant of easements.

This s. effects the same object as the Confirmation of Sales Act of 1862 (25 & 26 Vict. c. 108), but without any necessity for obtaining the previous sanction of the Chancery Division.

Consent to sale by trustees not necessary.

Trustees may under this s. during a minority sell surface apart from minerals, though this is not authorized by the power of sale in the settlement, and the sale being under the statutory power the consent of guardians to a sale required by the settlement power is not necessary: *Duke of Newcastle's Estates*, 24 Ch. D. 129.

Mortgage.

Mortgage.

Mortgage for equality money, &c.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

The money raised by mortgage under this s. being capital money must be paid either to the trustees or into Court (s. 22). The receipt of the trustees is a complete discharge, and the person making the advance is absolved from seeing that it is necessary to raise the money (s. 40), or that the requirements of the Act are complied with (s. 54).

For a form of summons for payment into Court by a mortgagee under this s., see Rules under S. L. A., 1882, Form XI., Chap. V., *infra*.

Undivided Share.

Undivided Share.

Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any

manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

Conveyance.

Completion of sale, lease, &c., by conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange, or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i.) All estates, interests, and charges having priority to the settlement; and

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any

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SALES, LEASES, AND OTHER DISPOSITIONS.

Conveyance.

statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to shew the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.

Easements, rights, and privileges.

The reference in this s. to "easements or other rights or privileges sold or leased," applies only to cases where they are conferred apart from the land, and created *de novo* on a sale or lease. The Act does not enable them to be created on an exchange or partition (see note to s. 3 (iii.), except that s. 17 enables their creation for mining purposes, in relation to the settled, or any other, land.

Conveyance.

This s. confers on the tenant for life a power, generally called a common law authority, as the exercise of it enables him to transfer the common law seisin (Sugden on Powers, 45, 8th ed.); but it is more properly a statutory power. The land passes not as under ordinary settlements by revocation and appointment of uses, but by conveyance of the estate itself in the land, in the same way as when a testator authorizes his executors to sell his lands without making any devise to them. The usual mode of exercising such a power in a will is by bargain and sale at common law (*i.e.* not a bargain and sale passing the use merely and requiring enrolment under 27 Hen. 8, c. 16).

How conveyance operates.

The conveyance under this s. passes the common law estate in the case of freeholds and leaseholds, and the right to admission in the case of copyholds, and that whether the person conveying has a legal or equitable estate, and on the estate so passed in case of freeholds uses may be declared. Also, in case of copyholds admittance may be had without any surrender, and the conveyance divests any legal estate vested in trustees under the settlement. On the grant of a lease the term created is a legal term, and the C. A., 1881, ss. 10, 11, annexes the rent and covenants in every case to the legal reversion, notwithstanding that the lessor has no legal estate. But this Act only operates on the estate, which is the subject of the settlement, and the legal estate passes only where it passed under, or has been otherwise conveyed to the uses of, the settlement, and has not been subsequently disposed of to secure

Lease.

Rent, &c., annexed to reversion.

money actually raised. If there be a mortgage in fee outstanding prior to the settlement, or made since under a power, the legal estate conferred by the mortgage will not be overreached or defeated by a conveyance under this Act, but where a lease can be granted binding on the mortgagee under the C. A., 1881, s. 18, a legal term will be created.

Estate of trustees.

It follows that where leaseholds or copyholds are vested in trustees on trusts corresponding to uses declared of land conveyed in fee simple, or where the legal estate in freeholds is vested in the trustees they will not be necessary parties to convey; the conveyance by the tenant for life alone divests the estate of the trustees. But it is conceived that the legal estate in order to pass by the tenant for life's conveyance must in some way be expressly made subject to the settlement. For instance, if an equity of redemption subject to a mortgage be settled, the mere payment of the mortgage money would not enable the tenant for life to convey the legal estate vested in the mortgagee. If however the settlement be by way of trust and not in such a form as would create legal limitations, then a re-conveyance to the proper trustees is part of the settlement, and the tenant for life could convey the legal estate though not actually derived through the settlement itself. It is conceived that the re-conveyance must be in the proper form and to the proper trustees. If the legal estate is made to vest in the trustees when it ought to be conveyed to uses, it seems doubtful whether the conveyance of the tenant for life would pass it.

Enrolment of copyhold assurance.

As regards copyholds (subs. (3)), the steward will enter on the rolls the settlement in the same manner as a will giving executors or trustees power to sell would be entered, and he will also enter the deed of conveyance. The rolls will thus be complete as regards the title.

Fine on admission.

Where a testator who has not been admitted devises his copyhold on trust, and the tenant for life sells before the trustees are admitted, the lord is not entitled to a fine as on the admission of the trustees as well as a fine on the admission of the purchaser: *Re Naylor and Spendla*, 34 Ch. D. 217 (*dissentiente*, Fry, L.J.). The will and the Act taken together operate as if the will had given the tenant for life express power to sell, in which case only one fine would be payable. This seems to answer the difficulty felt by Fry, L.J., the testator having died in 1885.

What estates overreached.

A conveyance under this s. will be similar in its overreaching effect to a revocation of uses and re-appointment under a power in a settlement. Consequently it overreaches a sale by the remainderman, though made before the Act (*Wheelwright* v. *Walker*, 23 Ch. D. 752); and the same principle applies to a mortgage by a remainderman; the assignee of a remainderman has no higher rights than the remainderman himself, but an assignee of the tenant for life who is exercising the power cannot be affected without his consent: see s. 50 (3) (4).

Assignee of remainderman.

Assignee of tenant for life.

Family charges.

Family charges created by, or under powers in, the settlement, where not dealt with for securing money actually raised (see subs. 3

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Conveyance.

(ii.)), will be displaced. Thus where there is a term for raising portions but no money has been raised, the term will be defeated in land sold or given in exchange or on partition, and the charge in the case of sale will be transferred to the proceeds of sale, and in the case of exchange or partition, it will be transferred to the land taken on exchange or partition, but if the term has been mortgaged the mortgagee must concur to release, in order to give a complete title. Where a child is merely entitled to his portion on which no money has been raised, an assignee from him is in the same position as the child. The rights of lessees are preserved by subs. 2 (iii.). In framing a re-settlement by tenant for life and tenant in tail, where there is a charge of jointure or portions under the subsisting settlement, the estate for life under that settlement should be preserved or restored, and then the powers in the settlement will continue (see Farwell on Powers, p. 18). A sale under the statutory power conferred by a new estate for life under the resettlement would not overreach the previously existing jointure or portions.

Power of trustees restricted.

Any possible conflict between a conveyance by the tenant for life and a conveyance by the trustees is prevented by the latter part of s. 56 (2), which precludes trustees from exercising powers similar to those given by the Act unless the tenant for life consents.

Enfranchisement.

Enfranchisement is included in this s., see note to s. 3 (ii.).

In addition to the special powers given by this s. a general power is given by s. 55 (2) for completing sales, &c., under this Act.

INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

Capital money under Act; investment, &c., by trustees or Court.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others, of the following modes (namely):

Mortgagee may be paid.

The words "subject to payment of claims," &c., enable the purchase-money to be applied in discharge of what is due to a mortgagee who concurs in conveying.

The Court cannot create a charge under this s. on capital money which has not been received: *Round* v. *Turner*, W. N. 1889, 38.

(i.) In investment on Government securities or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the

security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

The securities on which trustees are by law authorized to invest trust money are stated at pp. 176–179.

Where money or investments are held upon trust to purchase land to be settled, the trustees may invest in accordance with this subs.: *Mackenzie's Trusts*, 23 Ch. D. 750; *Re Tennant*, 40 Ch. D. 594. An investment in debentures issued by a local authority under s. 27 of the Local Loans Act, 1875 (38 & 39 Vict. c. 83) is not authorized: *Re Maberly*, *Maberly* v. *Maberly*, 33 Ch. D. 455.

Interim investment of money to be laid out in land.

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

This subs. includes a mortgage for a long term which is one mode of mortgaging the fee simple, and "affects the inheritance" (*Re Frewen*, *Frewen* v. *James*, 38 Ch. D. 383), also a mortgage of leaseholds by subdemise, which is the usual mode of mortgaging leaseholds, and "affects the whole estate the subject of the settlement." An incumbrance on the estate of the tenant for life is excluded, and so is a terminable charge, as a jointure rentcharge. Sect. 53 is alone sufficient to prevent a tenant for life paying off a charge of any such kind out of capital.

Incumbrance.

Terminable improvement rentcharges created under the Land Improvement Act, 1864, or similar Acts, were not incumbrances payable under this subs. out of capital money (*Re Knatchbull*, 27 Ch. D. 349, 29 *ib.* 588), but they are now made so payable by the S. L. A. Amendment Act, 1887, *infra*. A charge under the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61, s. 29), made in respect of any improvement thereby authorized is an incumbrance within this subs. Also an annual sum issuing out of Tithes for a long term: *Re Esdaile*, *Esdaile* v. *Esdaile*, 54 L. T. 637, W. N. 1886, 47.

Improvement rentcharge.

Agricultural Holdings Act charge.

Annual sum out of tithes.

Incumbrance in this subs. means an incumbrance affecting the land

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sold, or any other land which is the subject of the settlement: *Re Chaytor*, 25 Ch. D. 651.

(iii.) In payment for any improvement authorized by this Act:

See s. 25.

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

It has been suggested as a consequence that a leasehold interest purchased under subs. (vi.) must vest in the first tenant in tail who attains twenty-one, while the reversion in fee devolves on the issue in tail or next remainderman. But the ordinary trust declared of settled leaseholds is such as will correspond with the uses of the freeholds as nearly as the different tenure and rules of law will allow. The best mode of complying with this trust is to surrender the term, not to keep it on foot. Further, this trust may properly be treated as making the term attendant on the inheritance of an immediate reversion when purchased, thereby causing the term to cease.

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

Purchases are made by the direction of the tenant for life, if any competent to act. He is the person to contract, and s. 42 frees the trustees from any liability for adopting his contract. They are not bound to inquire as to the propriety of the purchase or answerable for the title, nor for the conveyance if it purports to convey the land in a proper manner.

Subss. (vii.) and (viii.) do not apply to capital money arising under settlement by conveyance on trust for sale unless the application is authorized by the settlement: see s. 63 (2) (ii.).

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

Payment out of Court to trustees.

Under this s. money paid into Court may be paid out to trustees for the purpose of being invested or applied. They are (s. 40) "persons empowered to give an absolute discharge" within ss. 21 (ix.) 40. This principle has been acted on in the case of money in Court under the Lands Clauses Act (*Hobson's Trusts*, 7 Ch. D. 708; *Re Evans*, 14 *ib.* 511; *Re Gooch*, 3 *ib.* 742; *Ex parte Bowman*, W. N. 1888, 179), which only authorizes payment to a person absolutely entitled, and does not contain the words "empowered to give an absolute discharge." The authority of *Re Hobson's Trusts* was doubted in *Re Smith* (40 Ch. D. 386), but it was considered clear that the payment out could be made under this Act (presumably under subs. ix. of this s. or s. 32 or both taken together), but it is a discretionary power, and in the particular case the Court declined to order payment on the ground of certain persons not being properly represented.

Payment to persons having power to appoint.

Payment will be made to persons having a joint power of appointment without requiring them to make an appointment: *Re Winstanley*, 54 L. T. 840; W. N. 1886, 92.

Sending money abroad.

Trustees may be appointed abroad to receive money required to be sent there: *Re Lloyd, Edwards* v. *Lloyd*, 54 L. T. 643; W. N. 1886, 37.

Small sums.

Application for payment of a sum not exceeding £1000 should be by summons in Chambers: R. S. C. 1883, Or. LV., r. 2 (2). But see *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541.

For orders under this Act directing payment out to trustees of money paid in on a compulsory purchase, see *Wright's Trusts*, 24 Ch. D. 662; *Harrop's Trusts*, *ib.* 717; *Duke of Rutland's Settlement*, W. N. 1883, 140; *Re Rathmines Drainage Act*, 15 L. R. Ir. 576.

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act:

Costs of sale.

As to what costs may be paid under this subs., see *Re Beck*, 24 Ch. D. 608; *Re Llewellin, Llewellin* v. *Llewellin*, 37 Ch. D. 317; *Re*

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Rudd, W. N. 1887, 251; and what may not, *Re Rudd, ubi sup.*; *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 338; S. C. on appeal W. N. 1889, 84 (costs of tenant for life's incumbrancers); *Re Eyton*, W. N. 1888, 254. Costs on the higher scale were allowed in *Re Chaytor*, 25 Ch. D. 651, 655. As to the costs of proceedings for the recovery or protection of settled land, see s. 36.

Tenant for life's charges.

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Direction of tenant for life as to investment.

Every investment, or other application of capital money, must be made by the direction of the tenant for life, if any competent to act, (s. 22 (2) (3)), and investments cannot be varied without his consent (*ib.* (4)), and his assignee (if any) must also consent, s. 50 (3) (4). The sale of settled land can no longer be taken in any case to be for the purpose only of investment of the proceeds in the purchase of other land to be settled to the same uses. (See *Mortlock* v. *Buller*, 10 Ves. 309.)

Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

Payment out to trustees of money paid in.

It has been decided (*Cookes* v. *Cookes*, 34 Ch. D. 498), that a tenant for life consenting to the payment of capital money into Court has exercised the option given by this subs., and that the money must remain there and be invested and applied by the Court. But there does not seem to be anything in the Act which binds the tenant for life permanently by his option once exercised. Having regard to the power of payment out to trustees conferred by s. 32 with respect to all money liable under any Act to be invested in land, it seems rather a confined construction of this Act to say that that s. does not include this Act and that money paid in under this Act is the only money paid in under an Act which cannot be paid out to trustees. Also a payment out by the Court under s. 21 (ix.) is an application of the money standing on exactly the same footing as any payment or application under the previous subss. (i.) to (viii.). It seems difficult to give any good reason for saying that where one of those subss. is applicable to a given sum of money all the others are not applicable also.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of

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INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

Whether capital money is equitably converted.

This sub-s. is a statutory direction that capital money arising under the Act shall devolve as land, but there are no express words operating to create the ordinary equitable conversion into land by directing the money to be laid out in the purchase of land to be settled. The land having been sold, the proceeds necessarily, by operation of the general principle of equity, become liable to be re-invested in land of the same kind to be settled in like manner as the land sold, and this subs. is merely supplementary to that general principle. If, for instance, the land sold were leasehold, the proceeds continue liable to vest in the first tenant in tail who attains twenty-one, unless and until invested in the purchase of fee simple land, by which the line of devolution would be changed. This view is in accordance with the case of *Re Duke of Marlborough, D. of Marlborough* v. *Marjoribanks* (32 Ch. D. 11, 13) in which it was held that the proceeds of the sale of heir-looms, notwithstanding s. 37 (2), retained their original quality and were personal estate until invested in land. The point is of importance in framing settlements of money to be invested in land. If a direction that the money shall "be held and applied as capital money arising under the Settled Land Act from the settled land," does not operate as an equitable conversion into land, then it merely makes the money devolve as land as nearly as the law permits, and the money will vest absolutely

Proceeds of heir-looms.

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in the first tenant in tail unless a clause is added expressly directing an investment in the purchase of land. By statute only, but not by trust or contract, money may be made to devolve as land though not equitably converted. If there is an equitable conversion the money is in equity entailed land, and the absolute interest can only be acquired by a bar of the entail.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

The capital money to be invested or applied under this s. is the residue (if any) after payment of claims properly payable thereout under s. 21.

The consent of the assignee of the tenant for life is necessary to the investment or application: see s. 50 (3).

As to capital money arising from sale of a lease or other estate or interest less than the fee simple, or of a reversion, see s. 34.

See form of summons for payment into Court under this s., S. L. A. Rules, Forms IX.–XI., Chap. VI. *infra*.

Investment in land in England.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

England includes Wales and Berwick-on-Tweed in Acts of Parliament (20 Geo. 2, c. 42, s. 3), but not in deeds or other documents.

Settlement of land purchased, taken in exchange, &c.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

Estates not capable of creation by settlement.

Where the money arises from an estate inalienably entailed (see s. 58 (1) (i.)), or from an estate where the tenant in tail in remainder has barred his estate tail and converted it into a base fee, there seems no

doubt that this subs. gives a statutory authority to create the corresponding inalienable estate tail or base fee in land purchased with the proceeds of sale. The same point arises under the Lands Clauses Consolidation Act, 1845, s. 69. The conveyance, for instance, to a rector or vicar and his successors could not be made except under statutory authority.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

The last words of this subs. are the usual words in the common form, but were not contained in the corresponding clause in Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 4). Their absence made that clause objectionable, the vesting being merely negatived, so that on the death under age of the first tenant in tail, he was simply excluded, and the leaseholds reverted to the settlor: *Gosling* v. *Gosling*, 1 De G. J. & S. 16; *Christie* v. *Gosling*, L. R. 1 H. L. 279; 1 Jarm. Wills, 274, n. (d.), 4th ed. The last words of this subs. carry the leaseholds with the freeholds to the next issue in tail or the next tenant in tail by purchase if he attains twenty-one, and if not, through all tenants in tail by purchase till one does attain that age.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

See note to s. 5.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be sub-

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jected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

VII.—IMPROVEMENTS.

IMPROVEMENTS.

Improvements with Capital Trust Money.

Improvements with Capital Trust Money.

25. Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

Description of improvements authorized by Act.

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(ii.) Irrigation; warping:

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

(ix.) Clearing; trenching; planting:

(x.) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not:

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By 48 & 49 Vict. c. 72, s. 11, subs. (1), this section is extended to dwellings for the working classes, see Chap. VI. *infra*.

Dwellings for working classes.

(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:

The cost of rebuilding stables, and of water supply and drainage for a mansion, and of building an agent's house and cottages, have been treated as within this subs. (*Re Houghton*, 30 Ch. D. 102), but would have been authorized under the general jurisdiction of the Court (*Re Houghton*, *ubi sup.*, and see *Re Lytton*, W. N. 1884, 193; and as to water supply see *Re Lytton*, 38 Ch. D. 20.) As regards silos the Agricultural Holdings Act, 1883, does not appear to have been referred to in the case of *Re Broadwater*, 54 L. J. Ch. 1104. Silos, however, are an improvement in which capital money under this Act is authorized to be laid out by that Act (*infra*, p. 256).

Stables, water supply, &c.

Silos.

(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvi.) Markets and market-places:

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on pay-

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ment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(xviii.) Sewers, drains, water-courses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(xx.) Re-construction, enlargement, or improvement of any of those works.

Mansion.

The improvements authorized by this s. do not include the erection or general improvement of a mansion-house. That must still be effected under the Limited Owners' Residences Acts (33 & 34 Vict. c. 56, and 34 & 35 Vict. c. 84).

In one case improvements which trustees were empowered to pay for out of income were authorized by the Court to be paid for out of capital: *Clarke* v. *Thornton*, 35 Ch. D. 307; see also *Re Lord Stamford*, 56 L. T. 484.

Agricultural Holdings Act.

By the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 29, it is enacted as follows:—

29. . . "Capital money arising under the S. L. A., 1882, may be applied in payment of any moneys expended, and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first or second parts of the schedule hereto, as for an improvement authorized by the said S. L. A."

The schedule referred to is as follows:—

PART I.

Improvements to which consent of landlord is required.

(1.) Erection or enlargement of buildings.
(2.) Formation of silos.
(3.) Laying down of permanent pasture.
(4.) Making and planting of osier beds.
(5.) Making of water meadows or works of irrigation.
(6.) Making of gardens.
(7.) Making or improving of roads or bridges.
(8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water-power, or for supply of water for agricultural or domestic purposes.
(9.) Making of fences.
(10.) Planting of hops.

(11.) Planting of orchards or fruit bushes.
(12.) Reclaiming of waste land.
(13.) Warping of land.
(14.) Embankment and sluices against floods.

PART II.

Improvements with Capital Trust Money.

Improvement in respect of which notice to landlord is required.

(15.) Drainage.

Sect. 31 (v.) of this Act enables a tenant for life to make binding contracts in regard to improvements authorised by it.

Approval by Land Commissioners of scheme and payment thereon.

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(2.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court,

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the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

This s. gives the tenant for life a choice of three modes in which he may obtain a sanction to expenditure, so as to enable the amount to be paid out of capital, and so as to free the trustees from responsibility if the payment is to be made by them. A certificate of (1) the Land Commissioners, or (2) a competent engineer or able practical surveyor that the work has been properly executed, and what amount is payable, or (3) an order of the Court authorizing payment. Under any of these three authorities trustees will be safe in paying the amount mentioned in the certificate or order to the tenant for life, or as he may direct, he being the person who procures the execution of the work.

The result of this s. seems to be that where capital money is in the hands of trustees, any scheme for its application in improvements must be approved by them; but if they refuse s. 44 appears to give an appeal to the Court. If the money is in Court then by sub-s. (3) the scheme must be approved by the Court. It must be approved before the works are commenced: *Re Hotchkin*, 35 Ch. D. 41. But extra expenditure incidental to the scheme was allowed in *Re Lytton*, 38 *ib.* 20. Whether the cost of improvements on lands sold can be paid after sale seems doubtful: *Re Hotchkin*, 35 Ch. D. 41.

Previous approval.

Extra cost.

Payment after sale.

The Court will not hear counsel for the trustees in support of an application by the tenant for life whose interest is opposed to that of the remainderman: *Re Hotchkin, ubi sup.* Where there are no trustees and the tenant in tail, who is before the Court, does not require them to be appointed, the Court will act under this s. without them: *Clarke* v. *Thornton*, 35 Ch. D. 316.

Not retrospective.

This s. is not retrospective: *Re Knatchbull's S.E.*, 27 Ch. D. 349.

For forms of summonses under this s. see S. L. A. Rules, Forms XII., XIII., XV., and XVI. (Chap. VI., *infra*), and for the nomination of an engineer or surveyor see Form XIV.

Concurrence in improvements.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

Obligation on tenant for life and

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited

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IMPROVEMENTS.

Improvements with Capital Trust Money.

successors to maintain, insure, &c.

estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

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IMPROVEMENTS.

Execution and Repair of Improvements.

Protection as regards waste in execution and repair of improvements.

Execution and Repair of Improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

But for this s. the tenant for life would not be able to enter as against his own tenant for executing works on the land of the tenant or on adjoining land, unless the tenant's lease so provides. Also, the works might be such as a tenant for life impeachable for waste could not execute but for this s.

Improvement of Land Act, 1864.

Extension of 27 & 28 Vict. c. 114, s. 9.

Improvement of Land Act, 1864.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act.

CONTRACTS.

Power for tenant for life to enter into contracts.

VIII.—CONTRACTS.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

In this s. enfranchisement is not mentioned. It is included in the term sale by force of s. 3 (ii.), which authorizes the tenant for life

"to sell, &c., so as to effect an enfranchisement." See also subs. (vi.) *infra*.

For regulations respecting sales, &c., see s. 4.

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

The consideration paid under this sub-s. for varying the terms of a lease would be income: see *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 660.

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

As to the terms on which a tenant for life may accept a surrender of a lease, see s. 13.

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

Under this sub-s. a tenant for life may contract, and, where com- Contracts.

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CONTRACTS.

petent to act, he is the proper person to contract, as well as to direct investments of capital money. By s. 42 the trustees are freed from all responsibility in adopting any such contract.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

Contracts by tenant in tail.

The contract under this Act of a tenant in tail has the same effect as that of a tenant for life (see s. 58 (1) (i.)) and binds the successor, notwithstanding that the ordinary contracts of a tenant in tail do not so bind. The ordinary contract if binding would defeat the successor's title in like manner as the contract of an owner in fee simple, but under this Act the contract enures for the benefit of the successor.

This s. renders an intending purchaser or lessee or other person contracting with the tenant for life under the powers given by the Act, perfectly safe as regards performance of the contract. Every successor of the contracting tenant for life will be bound and liable to perform the contract in the same way as that tenant for life himself.

For a form of summons for liberty to enforce a contract under this s., see S. L. A. Rules, Form XVII. (Chap. VI., *infra*).

IX.—MISCELLANEOUS PROVISIONS.

MISCELLANEOUS PROVISIONS.

Application of money in Court under Lands Clauses and other Acts. 8 & 9 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be

laid out in the purchase of land to be made subject to a settlement, then in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

Money in Court arising from sale of land inalienably entailed by Statute was ordered to be paid to trustees who had been appointed under s. 38: *Re Bolton*, W. N. 1885, 90; 52 L. T. 728.

This s. enables money in Court under the Lands Clauses Acts and other similar Acts to be applied in like manner as money arising from a sale under this Act. The company by whom the money is paid in will be liable to pay the costs of the application and of the disposal of the money in like manner as they are liable to pay the cost of reinvestment in land or of any other disposal of the money authorized by the Act under which the money is paid in, including an investment in debenture stock under s. 21 of this Act: *Hanbury's Trusts*, 31 W. R. 784, W. N. 1883, 116; and purchase-money paid into Court under the Lands Clauses Act may be paid out to the trustees of the settlement: *Duke of Rutland's Settlement*, 31 W. R. 947, W. N. 1883, 140; and see *Wright's Trusts*, 24 Ch. D. 662; *Harrop's Trusts*, *ib.* 717; *Re Bolton Estates Act*, W. N. 1885, 90; *Re Rathmines Drainage Act*, 15 L. R. Ir. 576.

Examination of married woman.

Notwithstanding this s. Kay, J., would not dispense with the examination of a married woman on an application under s. 50 of the S. E. A., 1877: *Re Arabin's Trusts*, W. N. 1885, 90. But no examination is necessary where she comes within the M. W. P. A., 1882: *Riddell* v. *Errington*, 26 Ch. D. 220; *Re Harris*, 28 *ib.* 171.

Proceeds of charity land.

In the case of *Byron's Charity* (23 Ch. D. 171), it was held that the proceeds of the sale of charity land paid into Court under the Lands Clauses Act were within this s., and might be invested as authorized by s. 21 (i.). It is difficult to see how this decision can be correct. The money in Court must, in order to be within this s., be not merely money liable to be laid out in the purchase of land generally, but in the purchase of "land to be made subject to a settlement." A trust deed of charity land is in no sense a settlement within the meaning of s. 2 (1) of this Act. The argument seems to have been that the money was settled within the meaning of s. 69 of the Lands Clauses Act, but no money is within this Act unless representing land settled within the meaning of this Act.

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MISCELLANEOUS PROVISIONS.

*Costs of interim investment.

*The costs of an interim investment of purchase-money paid in by a public body were directed to be paid by them: *Hanbury's Trusts*, 31 W. R. 784, W. N. 1883, 116.

Where under a private Act purchase-money was paid into Court, the Court appointed new trustees for the purposes of this Act in place of trustees under a will of the land sold who retired, and the money was directed to be paid out to the new trustees: *Wright's Trusts*, 24 Ch. D. 662; and see *Harrop's Trusts*, 24 Ch. D. 717.

Payment out to trustees.

Application of money in hands of trustees under powers of settlement.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

Money bequeathed to be invested in land.

This s. makes the powers given by the Act as to disposal of capital money, applicable to all money in the hands of trustees liable to be laid out in land, whether before or after the commencement of the Act; and though s. 2 (1) defines "settlement" as an instrument by which "land stands limited," &c., it is not material that the money did not arise from the sale of land, but was money originally bequeathed in trust to be laid out in the purchase of land to be settled (*Mackenzie's Trusts*, 23 Ch. D. 750). This seems in accordance with the old rule that money liable to be laid out in the purchase of land is to be considered as land, therefore a settlement of the money in this manner is to be considered as a settlement of land. The purchase of land may be deferred, and an interim investment made under s. 21 (i.): *Re Maberly*, 33 Ch. D. 455; even in the case of money bequeathed on trust for immediate investment in land: *Re Mackenzie's Trusts*, 23 *ib.* 750; *Re Tennant*, W. N. 1889, 47 (which mentions "preference" stock by mistake for debenture stock).

The effect of this s. is to free all money liable to investment in land from any particular restriction as to the land to be purchased, as, for instance, that it should be in a particular county. The power of investment in land is enlarged as well as the power of interim investment or other application (s. 21).

Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court

on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

Where a tenant for life is entitled to the rent of leaseholds for a short term he would be injured by a sale if he only received the income of the proceeds, and where the reversion on a lease is sold he may be benefited. This s. provides for the adjustment of the rights of the tenant for life and remainderman notwithstanding the sale. (See on this section *Griffith's Will*, 49 L. T. 161.)

Apportionment between successive owners.

For the principle on which apportionment of the purchase-money and income between tenant for life and remainderman is made on a sale of leaseholds for years, see *Askew* v. *Woodhead*, 14 Ch. D. 27; *Re Hunt's Estate*, W. N. 1884, 181; and of reversions on leases, see *Re Wootton's Estate*, L. R. 1 Eq. 589; *Re Mette's Estate*, *ib.* 7 Eq. 72; *Re Wilkes' Estate*, 16 Ch. D. 597; *Cottrell* v. *Cottrell*, 28 *ib.* 628; *Re Griffith's Will*, 49 L. T. 161. On the sale of renewable leaseholds no apportionment was made in *Re Barber*, 18 Ch. D. 624, and the cases there followed.

For a form of summons for the application of money paid into Court on the sale of a lease or reversion see S. L. A. Rules, Form XVIII. (Chap. VI., *infra*).

Cutting and sale of timber, and part of proceeds to be set aside.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

See *Duke of Newcastle's Estates*, 31 W. R. 782, W. N. 1883, 99.

Before this Act it was necessary for a tenant for life impeachable for waste to commence an action in order to have ripe timber cut under the direction of the Court. The course was to invest the whole proceeds, and give him no part of the capital, but only the income.

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This s. following the principle as to mineral rents (see s. 11) gives him one fourth of the capital.

This s. does not enable a tenant for life who is entitled to cut and sell timber for his own use, to receive for his own use the valuation price of uncut timber sold with the estate under this Act: *Re Llewellin, Llewellin* v. *Williams*, 37 Ch. D. 317; and see *Cockerell* v. *Cholmeley*, 1 Clark & Fin. 60.

For forms of summons under this s. see S. L. A. Rules, Forms VI. and VII. (Chap. VI., *infra*).

Proceedings for protection or recovery of land settled or claimed as settled.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

Before this Act the whole cost of defending or bringing actions of ejectment in respect of settled land, or preserving property from deterioration by a nuisance on adjoining land, such as a sewage farm, fell on the tenant for life. Where there was money in Court liable to be laid out in land, the Court often repaid the tenant for life the cost incurred by him, but the Court had no jurisdiction to charge the land. This s. gives the power. It replaces and supplements s. 17 of the S. E. A., 1877, which is now repealed (see schedule to this Act).

In *Re Jones* (31 W. R. 399), the Court sanctioned the raising of money for discharging the costs of an action by an infant tenant in tail for the benefit of the settled estates. In *Stanford* v. *Roberts* (52 L. J. Ch. 50), where there were legal limitations in favour of the plaintiff for life with remainder to an infant tenant in tail, the Court refused to order payment out of the estate of the costs of an Act to enable a sale, whether the application succeeded or not, following *Dunne* v. *Dunne* (7 D. M. & G. 207, 213), but sanctioned an application for the Act, the tenant for life paying the costs unless the Act directed otherwise. In such a case the Court has no power to charge the land.

Proceedings in the House of Lords to establish a claim to a Peerage carrying with it the title to land, are within this s.: *Re Earl of Aylesford*, 32 Ch. D. 162.

Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so

as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them. SS. 37, 38. MISCELLANEOUS PROVISIONS.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

The Court had no jurisdiction to sell heirlooms simply on the ground of convenience: *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635.

Sales of heirlooms were ordered under this s. in *Re Brown*, 27 Ch. D. 179; *Re Houghton*, 30 Ch. D. 102; *Re Duke of Marlborough*, *ib.* 128, and *Re Rivett-Carnac*, *ib.* 136, but refused in *Re Beaumont*, 58 L. T. 916. Sales of heirlooms.

A dignity or title of honour descending to the heirs general or the heirs of the body, being an incorporeal hereditament, is "land" within the meaning of this s., so that heirlooms settled to go along with it can be sold: *Re Rivett-Carnac*, 30 Ch. D. 136. Title of honour.

A trustee with power of sale of land is a trustee for the purposes of this s.: *Constable* v. *Constable*, 32 Ch. D. 233. Trustees under this s.

Incumbrances discharged out of the proceeds of heirlooms need not be kept on foot for the benefit of the person who would have been entitled to the heirlooms if not sold: *Re Duke of Marlborough*, 30 Ch. D. 127, affirmed 32 *ib.* 1.

See forms of summons under this s. S. L. A. Rules, Forms VI. and VII. (Chap. VI., *infra*).

X.—TRUSTEES. TRUSTEES.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his Appointment of trustees by Court.

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TRUSTEES.

testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

Trustees for purposes of the Act.

The settlement, if made before this Act, may give to trustees a power of sale or of consent to or approval of a sale, and then they, or their successors in office, will be trustees for the purposes of the Act. No others will be trustees for those purposes. The settlement, if made after the Act, may contain a similar power, or may declare certain persons trustees for the purposes of the Act. The trustees in all these cases will be trustees for the purposes of the Act (s. 2 (8)), and being trustees of the settlement the tenant for life, if power is given to him for the purpose, can appoint new trustees. Whether the surviving or continuing trustees or trustee, can appoint new trustees, see note to C. A., 1881, s. 31 (1)). The new trustees will also be trustees for the purposes of this Act (C. A., 1881, s. 31 (5)). If these trustees, whether original or substituted, are willing to assist the tenant for life in putting in force the powers of this Act, an application to the Court under this s. is unnecessary. But if they refuse to assist, or if there are no trustees, an application to the Court for the appointment of trustees is necessary, and it is conceived that the Court would require the refusing trustees, if any, to be served (see s. 46 (5)). It is proper in the interest of remaindermen not to allow the tenant for life to appoint trustees for the purposes of the Act unless empowered to do so by the settlement. The tenant for life having full power to sell without any sanction by the Court, it is conceived that the Court will in every case appoint trustees on an application by the tenant for life where there are refusing trustees as well as where there are no trustees. The only duty of the Court will be to see that the persons to be appointed are fit and proper persons.

Number of trustees.

Single trustee.

There must be at least two trustees unless the settlement authorizes one alone to receive capital money (see ss. 39 and 45 (2)). Where in a settlement before the Act the power of sale is given to the survivor of two or more trustees this will be a sufficient authority: *Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595; 32 W. R. 313, as to which case see note to s. 45 (2). In a settlement made after the Act there should, if so desired, be not only an express authority to a sole trustee to act generally for the purposes of the Act, but also an express authority to him to receive capital money arising under the Act.

Who not appointed trustee.

The Court will not appoint the tenant for life, or a person who might become tenant for life, to be trustee: *Harrop's Trusts*, 24 Ch. D. 717, 719; nor his solicitor: *Wheelwright* v. *Walker*, 23 Ch. D. 763, though he was so appointed by the settlement: *Re Kemp*, 24 Ch. D. 485, nor two persons nearly related to each other: *Re Knowles*, 27 Ch. D. 707; nor (in Ireland) make any appointment unless satisfied that it is beneficial to all persons interested: *semble*, *Burke* v. *Gore*, 13 L. R. Ir. 367. But the Act seems to have been construed in a rather more confined manner in Ireland than in England.

Application how made.

Applications for the appointment of trustees should be made by summons in Chambers, see S. L. A. Rules, (Chap. VI., *infra*), and for form of summons see Appendix to those Rules, Form XIX.

Stamp on appointment.

The Commissioners of Inland Revenue do not require that an appointment of trustees under this s. should bear a 10*s.* stamp where there had previously been no trustee for the purposes of the Act: *Re Potter*, W. N. 1889, 69; but see *Re Kennaway*, *ib.* 70.

Number of trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

In the case of settlements executed before this Act but after the Act 23 & 24 Vict. c. 145, there may not be an express clause authorizing a surviving or sole trustee to give a receipt, but that Act as to settlements to which it applies, and C. A., 1881, s. 36, as to all settlements, supplies the clause where a sole trustee is authorized to sell and brings the case within this s.: *Garnett Orme and Hargreaves' Contract* (25 Ch. D. 595), as to which see note to s. 45 (2).

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

This s. follows the practice of the Court, which does not usually pay out money to a single trustee.

Representative of surviving trustee.

It is conceived that the prohibition against paying to fewer than two applies to the case of a sole personal representative of a surviving trustee (see s. 38 (2)), so that a sole executor or administrator could not give a discharge. The word "representative" in the singular in the next s. applies to the case where the settlement authorizes a sole trustee to act.

As to where a single trustee is authorized to receive capital money, see note to last s.

Trustees' receipts.

40. The receipt in writing of the trustees of a settle-

ment, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

See note to last s. as to the meaning of "representative" in the singular.

This power to give receipts necessarily applies to trustees appointed by the Court under s. 38 (*Cookes* v. *Cookes*, 34 Ch. D. 498), otherwise no sale could be made except on payment into Court.

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the

conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

The result of the two last preceding ss. seems to be that trustees are free from all responsibility of any kind except to take care of the money paid to them and make proper interim investments. When the money is to be re-invested in land they are expressly exempted from any responsibility as to the propriety of the purchase, the validity of the title, or the form of conveyance if it purports to convey the land in the proper mode. In parting with the purchase-money they have only to see that they pay it, by direction of the tenant for life, to some person who appears to join in the conveyance for some necessary or proper purpose. There ought, therefore, to be no difficulty in procuring trustees for the purposes of the Act. As to a conveyance "in the proper mode" referred in this s. see s. 24.

Trustees' reimbursement.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Reference of differences to Court.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

As to the nature of the differences included in this s. see *Wheelwright* v. *Walker*, 23 Ch. D. 762.

For form of summons for a declaration under this s. see S. L. A. Rules, Form XX. (Chap. VI., *infra.*)

Notice to trustees.

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally,

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each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

It is conceived that this s. must be read in connection with s. 39 (2), especially subs. 2. It is obvious that in settlements before the Act there can be no clause expressly excluding this subs., and that the exclusion (if any) must be by necessary implication. Accordingly in *Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595, an authority to pay money to a surviving trustee was considered by Bacon, V.C., "a contrary intention" within the meaning of this subs. It is understood that the correctness of this construction has been questioned by a judge in Chambers, but many titles must have been accepted on the faith of its correctness.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

"Month" means calendar month: 13 & 14 Vict. c. 21, s. 4.

47 & 48 Vict. c. 18, s. 5.

By S. L. A., 1884, s. 5 (which cancels the decision *Re Ray*, 25 Ch. D. 464), the notice may be in general terms except as to a mortgage or charge, and may be waived by a trustee. Notice once given will it is conceived continue in force during the whole life of the tenant for life giving it.

General notice.

Where trustees bound to take proceedings.

The trustees to whom notice is given are not bound to take proceedings whatever their opinion may be as to the proposed dealing. In *Wheelwright* v. *Walker*, 23 Ch. D. 762, Pearson, J., seemed to think that if a tenant for life were attempting to commit a fraud, as by selling for a very low price, it would be the duty of the trustees to interfere, but s. 42 expressly exempts them from liability for not taking any proceeding which it is competent for them to take. In the case of a fraudulent sale or other disposition, the purchaser must almost necessarily be a party to the fraud, and the transaction could be set aside. It is conceived that any proceeding must be at the risk of the trustees.

It is sufficient if at the time of completion of the contract there are trustees, and that notice has been given: *Hatten* v. *Russell*, 38 Ch. D. 334. The notice is a matter with which the purchaser acting in good faith is not concerned: *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 623.

Time of notice.

It is best however to provide that the contract is not to become binding until the notice has expired or been waived, without any proceedings being taken whereby the sale is prevented. If the tenant for life should die before the expiration of the notice the successor would not be bound.

Notice by trustees.

Where trustees are selling on behalf of an infant under s. 60, it is not necessary for them to give notice under s. 45 to themselves or their solicitor; they are not the tenant for life, they are merely trustees exercising the powers of the Act on behalf of the tenant for life; besides, the notice would be a mere form. But the committee of the estate of a lunatic selling under s. 62 appears to be in a different position; he actually stands in place, and would convey in the name of the lunatic. He must therefore previously have obtained authority from the Court of Lunacy to give notice: *Re Ray*, 25 Ch. D. 464.

By lunatic's committee.

Protection of purchaser.

The purchaser is expressly protected by subs. 3 from seeing that notice is given, but he must, it is conceived, see that there are or have been in existence at least two trustees, or one trustee in cases where the settlement provides that one trustee may act alone. Under the S. L. A., 1884, notice may be waived by the trustees, therefore the purchaser need not see that the two trustees or the one trustee, as the case may be, have been appointed at least a month previous to completion. And where the transaction is within the month, as the trustees may not only waive notice but may also accept less than a month's notice, and as the purchaser is exempted by subs. (3) of this s. 45 from "enquiry respecting the giving of any such notice," it is conceived that he is exempted from seeing that any notice is required or what length of notice was given. Where the transaction is a sale the concurrence of the trustees in the conveyance to acknowledge receipt of the purchase-money would in itself be a waiver of notice. If the purchase-money is to be paid to the trustees the purchaser must see to the due appointment of those trustees, otherwise he does not obtain a valid receipt, unless the sale is made by the order of the Court (see C. A., 1881, s. 70).

Waiver of notice.

Actual knowledge that no proper notice has been given and that there was no waiver would invalidate his title: *Hatten* v. *Russell*, 38 Ch. D. 334. In such cases not even the legal estate would pass to the purchaser.

If the purchase-money is paid into Court it is not so clear that the purchaser must see to the due appointment of trustees, but it will be prudent for him to do so, until it is decided that the precaution is not necessary.

Notice in case of leases.

All settlements should expressly dispense with notice, at least as to leases.

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TRUSTEES.

*Order dispensing with notice.

†Enfranchisement.

*An order has been made by the Court dispensing with notice under this s., but it seems very doubtful whether any such order can properly be made: *Honywood* v. *Honywood*, 1862 H. No. 121, 25th July, 1883.

†An enfranchisement is a sale within this s.: see note to s. 3 (ii.).

XI.—COURT; LAND COMMISSIONERS; PROCEDURE.

COURT; LAND COMMISSIONERS; PROCEDURE.

Regulations respecting payments into Court, applications, &c.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

Applications are directed to be by summons in Chambers: see Rule 2 under S. L. A. (Chap. VI., *infra*).

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.

(7.) General Rules for purposes of this Act shall be deemed Rules of Court within s. 17 of the Appellate Jurisdiction Act, 1876, as altered by s. 19 of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

See S. L. A. Rules (Chap. VI., *infra*).

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be

from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(9.) General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connexion with which the personal chattels to be dealt with in the Court are settled.

As to proceedings in the County Court under this Act see County Court Rules, 1889, Or. xxxviii.

Payment of costs out of settled property.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or

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COURT; LAND COMMISSIONERS; PROCEDURE.

any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

Costs.

As to payment of the tenant for life's costs of a sale including those of his own incumbrancers, see *Re Beck*, 24 Ch. D. 608. But this case was not followed as to the costs of the tenant for life's incumbrancers, which were disallowed in *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 339: see S. C. on Appeal, W. N. 1889, 84. As to costs incidental to the exercise of the powers of this Act, see s. 21 (x.) and note.

Constitution of Land Commissioners; their powers, &c.

48.—(1.) The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.

(2.) The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of any power or duty under any Act relating to the three several bodies of commissioners aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.

(3.) Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any assistant commissioner, secretary, or other officer or person then in office or employed under them.

(4.) All Acts of Parliament, judgments, decrees, or orders of any court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commis-

sioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.

(5.) All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit, or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

27 & 28 Vict. c. 114.

It is conceived that the expression "Act passed" only speaks and has effect after the Act in which it is contained has passed and includes that Act.

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COURT; LAND COMMISSIONERS; PROCEDURE.
Filing of certificates, &c., of Commissioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

Powers not assignable; contract not to exercise powers void.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

Disclaimer.

This s. does not expressly provide against disclaimer of a power, but

a tenant for life could not disclaim the power and accept the estate; the disclaimer to be effectual must be complete, more especially as he is a trustee of the power, s. 53: *Slaney* v. *Watney*, L. R. 2 Eq. 418.

Effect of section.

The effect of this s. is that the person defined in the Act as tenant for life entitled to exercise the powers conferred by the Act, always remains so entitled. He cannot divest himself of those powers, nor contract absolutely not to exercise them, but he may by assignment for value prevent himself from exercising the powers as against the assignee. Thus the execution of powers under the Act is governed by the same principle as the execution of powers conferred by a settlement, except that the latter are capable of being released and extinguished, and are bound by a contract not to exercise them; there is this further exception, namely, that a lease under the Act without fine made by the tenant for life while he remains in possession will bind all his assignees. The same principle applies to assignments made before as well as to those made after the commencement of the Act.

Subs. (4), so far as regards leases, is stronger as against a mortgagee under a mortgage of a life estate than the power of leasing in s. 18 of the C. A., 1881, as against a mortgagee of the fee simple. The latter power does not affect a mortgagee prior to the Act or a mortgagee who contracts himself out of the Act. Under subs. (3) and (4) of this s. any lease at the best rent and without fine made in conformity with this Act by a tenant for life while in possession binds his mortgagee, whether the mortgage be made before or after this Act and notwithstanding any agreement to the contrary. This seems unobjectionable, as the mortgagee of a tenant for life has no permanent interest in the land, and the exercise of the power must generally be for his benefit by producing income.

Cesser of powers of tenant for life.

Notwithstanding this s. the tenant for life will cease to have the powers conferred by the Act when there is a complete disentail operating as a complete disposition of the fee simple by tenant for life and remainderman. The land, then, no longer "stands for the time being limited to or in trust for any persons by way of succession" within s. 2 (1), and is no longer settled land within s. 2 (3), and the Act ceases to apply to it. If there be a re-settlement, that of course brings the Act again into operation. It will still be necessary, as at present, to preserve the life estate under the prior settlement in cases where it is desired to sell free from the charges of jointure and portions under that settlement; otherwise they, being "charges having priority to the re-settlement," could not be overreached by the statutory power attached to the new life estate (see s. 20 (2) (i.)); but it is conceived that, as in the case of ordinary settlement powers, so in the case of the statutory powers, the customary relimitation to the first tenant for life of his old life estate with all powers annexed thereto would put him back in the same position as before the disentail and re-settlement, he being in of his old estate: Sug. Powers, 71, 8th ed., and note to s. 20.

Effect of re-settlement.

The powers of the Act are given to a tenant in tail in possession (s. 58), but the Act ceases to be applicable when he bars the entail.

SS. 50, 51.

RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

Release by tenant for life to remainderman in fee.

Also, on a release by the tenant for life to the immediate remainderman in fee the Act ceases to be applicable, even where a jointure is still payable. It forms merely a charge, the estate for life is extinguished, and there ceases to be any estate in the land which stands limited by way of succession within s. 2 (1). But if portions are raisable at the time when the surrendered life estate would have determined, the land seems still to stand limited by way of succession.

As to how long the powers of a tenant for life continue, see also note to s. 2 (4).

Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

The previous s. precludes the tenant for life from divesting himself of the powers conferred by the Act. This s. precludes the settlor from taking away or cutting down those powers, and from giving them to trustees instead of to the tenant for life: *Re Clitheroe Estate*, 31 Ch. D. 138. Subs. (1) makes any clause of forfeiture void, and by subs. (2) an estate originally limited so as to cease when the tenant for life

attempts to make use of the powers of the Act, is enlarged into the estate which would have existed irrespective of the clause of cesser.

The restraint on anticipation by a married woman is removed (s. 61 (6)) so as to enable the powers of the Act to be exercised by her notwithstanding that restraint.

The provisions made void by this s. are only provisions which prevent or tend to prevent the exercise of the powers of the Act. Consequently a limitation over on bankruptcy of a tenant for life or on alienation of his life estate is not affected. After a sale of the fee simple under the Act he would still be entitled to the income of the proceeds of sale until bankruptcy or alienation. There is, therefore, in such a case no provision tending to prevent the exercise of the statutory powers. On the other hand, a limitation over in case of non-residence seems to be rendered void, as a sale under the statutory power would prevent residence: *Re Paget*, 30 Ch. D. 161. In that case it was only decided that the forfeiture for non-residence would not apply to the income of the proceeds of sale. In the case of *Re Haynes*, *Kemp* v. *Haynes*, 37 Ch. D. 306, North, J., held that ceasing to reside before sale caused a forfeiture. It is difficult to see how this decision can be reconciled with subs. (1), which makes the condition void in all cases without exception, or with subs. (2), which is not confined to the income of the proceeds of sale, but enlarges the estate of the tenant for life in the settled land itself, and makes that estate continue for its whole possible existence irrespective of the condition as to residence. To hold that a forfeiture clause is effective notwithstanding this s. works against the settlor's intention. The tenant for life must sell in order to avoid residence. Also, under s. 24 (2) it would seem that a condition compelling residence, if effective, must apply to any other estate purchased with the proceeds of sale, and compel the tenant for life to reside where the testator never intended him to reside. The words "as near thereto as circumstances permit" seem clearly to shew that the condition as to residence, if not made void, must like any other condition (for instance, a condition binding the tenant for life to insure or do repairs) be imported into the settlement of any estate purchased, and be applicable thereto as it was to the estate sold. The condition of residence as applied to a particular estate is practically useless where the tenant for life has a power of sale.

The prohibition in this s. applies not only to a provision in the settlement itself, but also to a provision in any other instrument. Thus a bequest of an annuity to a tenant for life so long as he should reside on the estate would take effect under subs. (2) as an annuity for his whole life, and would not cease on sale of the estate.

Attempts to evade the Act.

It is conceived that a limitation by way of trust or otherwise to A. for his life of an annuity payable out of rents and profits, greater in amount than the income of the property, and, subject thereto, a limitation of the property during A.'s life to the use of or in trust for B., would not prevent A. being in effect tenant for life within the Act. He would be entitled to the income within s. 58 (ix.). Independently

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of the Act the Court would treat him as actual tenant for life and let him into possession or receipt of the rents, giving liberty to B., if at any time he thought the income exceeded the annuity, to apply to be let into possession or receipt. On any such application it is conceived that B. would be required when let into possession to undertake to keep down the annuity, and if so A. would be tenant for life determinable on the event of the rents and profits exceeding the annuity, and thus a tenant for life within s. 58 (ix.). It would also be open to A. to bring an action to have it declared that the limitation is an attempt to evade the Act within the meaning of s. 51 as a provision "tending or intended . . . . to prohibit or prevent him from exercising" the powers of the Act, and therefore void.

Provision against forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

See *Re Haynes*, *Kemp* v. *Haynes*, note to last s.

Tenant for life trustee for all parties interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

As a general rule the tenant for life is entitled to make the full profit out of all the legal incidents of his life estate. He may, when not impeachable for waste, cut all the profitable timber, though equity will restrain him from cutting where it is without adequate advantage and, apparently, simply malicious. On the same principle, before the Act 8 & 9 Vict. c. 106, s. 8, a tenant for life, with remainder to issue unborn, with remainder to himself in fee, could by simple conveyance destroy the contingent remainder, and no relief could be obtained in equity. But by this s. he is made a trustee as to all powers conferred on him by the Act, and is accountable as such. Thus the tenant for life may make an improper or improvident sale or lease, good in favour of the purchaser or lessee under the next s. 54, but under this s. he will be answerable to the same extent as a trustee making the same sale or lease. The general effect of this s. is to make the tenant for life answerable for an improvident or improper exercise of the powers conferred on him by the Act in the same manner as if he were an actual trustee. But the fact that he will derive a benefit is not in itself sufficient to prevent him from exercising his discretion: *Re Lord Stamford*, 56 L. T. 484; or altering the devolution of the property: *Re Duke of Marlborough*, *Marlborough* v. *Marjoribanks*, 32 Ch. D. 1, 11.

When sale not restrained.

Nor will he be restrained from selling merely on speculative evidence

adduced by the remainderman of the prospective value of the estate: *Thomas* v. *Williams*, 24 Ch. D. 558. *Secus*, if he attempts to sell the property infinitely below its value: *Wheelwright* v. *Walker*, 23 *ib.* 752, 762, *per* Pearson, J. See also note to s. 3 (i.) p. 226.

The tenant for life is not entitled to trustees' costs. Only one set of costs will be allowed to him and his mortgagees: *Sebright* v. *Thornton*, W. N. 1885, 176.

Costs.

General protection of purchasers, &c.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

This s. makes good the title of all persons claiming under an exercise by the tenant for life of the powers of the Act, provided they are not parties to and have no notice of any improper dealing. In regard to notice the C. A., 1882, s. 3, aids the purchaser's title.

Exercise of powers; limitation of provisions, &c.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exercisable from time to time.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

See the special powers for completion of sales, &c., conferred by s. 20.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

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Saving for other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

Amended by S. L. A., 1884.

Under the S. L. A., 1884, s. 6 (2), the consent of any one of two or more persons constituting the tenant for life is sufficient.

Mode of exercise of settlement powers.

By this s. all the powers of the settlement are preserved, but it would be very inconvenient where trustees have powers for sale or for other purposes at their discretion, that there should be also concurrent powers vested in the tenant for life under the Act. It is therefore provided that in all cases powers in trustees similar to those conferred by the Act are to be exercised only with the consent of the tenant for life. A person dealing with the tenant for life thus knows that no other antagonistic dealing can take place. The effect of this and the next s. is, that the settlor may enlarge but cannot restrict the powers of a tenant for life under the Act.

Conflict and cumulation.

In *Re Duke of Newcastle*, 24 Ch. D. 138, Pearson, J., considered that the first part of subs. 2, "But in case of conflict, &c.," merely meant that if there were a power in the settlement for the same purpose but not so large as a power in the Act, the tenant for life might exercise the power in the Act. But this is a case of cumulation, not of conflict, and is provided for by subs. 1. Two powers in one person cannot create any conflict; the one first exercised prevails. But a power under the settlement to trustees and a power for the same purpose under the Act to a tenant for life might create conflicting interests. Therefore subs. 2 provides that an exercise by the tenant for life of the powers of the Act is to prevail, and that the trustees are not to exercise their powers under the settlement without his consent. In this view the latter part of subs. 2 does not seem, as the learned

judge thought, to go away altogether from the case in the first part of the subs.

When trustees can mortgage or sell.

It is conceived, however, that to the exercise of a power given to trustees for raising charges by mortgage or sale, the consent of the tenant for life would not be necessary. The trustees would have a title paramount to that of the tenant for life, and he could not prevent the raising of the charges. Therefore a contract by the trustees to sell in such a case would prevail over a similar contract by the tenant for life, and no difficulty would arise. The case would be similar to that of contracts by two successive mortgagees, each with a power of sale. This construction is supported by the words "power exercisable for any purpose provided for in this Act," which must mean purposes connected with the settled land and the settlement, not purposes paramount to the rights of the persons claiming under the limitations of the settlement.

As the tenant for life must, before his contract has any binding effect, give one month's notice to the trustees or procure waiver of notice under S. L. A., 1884, s. 5 (3), any contract made by them before the expiration or waiver of the notice necessarily takes priority over the contract of the tenant for life, and thus no conflict between the two contracts can arise.

When tenant for life can sell alone.

When the tenant for life contracts to sell it is clear that he can give a title to a purchaser free from charges created by the settlement on which no money has been raised, s. 20 (2) (ii.), and they would be transferred to the proceeds of sale. In such case there would be no conflict between the provisions of the settlement and the provisions of this Act, and the trustees would not be necessary parties to the conveyance except for the other purposes of the Act.

Conflicting powers.

In the case of *Re Duke of Newcastle*, 24 Ch. D. 129; 52 L. J. Ch. 645; 48 L. T. 779, it was held,

Rents during minority.

(1.) That rents received by the trustees during minority were to be dealt with as directed by the settlement without regard to the Act.

Settlement powers how exercisable.

(2.) That a power to trustees with the consent of the tenant for life or in tail in possession, if of age, and, if not, of his guardians, to sell or exchange was exercisable by the trustees during minority of the infant tenant in tail with the required consent.

(3.) That a power to the guardians during minority to grant agricultural, building, and mining leases was exercisable by them with the consent of the trustees.

Mining rents.

(4.) That mining rents were to be applied as directed by the settlement, there being a "contrary intention" expressed within the meaning of s. 11;

Power under Act cumulative.

And (5.) That though there was no power for the purpose in the settlement, the trustees could sell surface apart from minerals under s. 17, and the consent of the guardians would not be necessary.

Stay of proceedings under Settled Estates Act.

Proceedings under an order for sale made under the Settled Estates Act, 1877, may be stayed so as to enable a sale under this Act: *Re Barrs-Haden*, 32 W. R. 194; W. N. 1883, 188; or a lease, *Re Poole*,

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32 W. R. 956. *And the powers under this Act overreach the provisions of a private estate Act passed previously to the commencement of this Act (*Re Chaytor*, 25 Ch. D. 651), but not an order of the Court: *Taylor* v. *Poncia*, *ib.* 646.

*Private Act overreached by this Act.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

For form of summons for opinion, advice, and direction under this subs. see S. L. A. Rules, Form XXI., Chap. VI., *infra*.

Additional or larger powers by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

This subs. prevents any question as to how the combined powers of the settlement and the Act operate. An additional power to sell or lease could, under the settlement taken alone, only operate by revocation and appointment of uses. Under this subs. the additional powers will be common law powers taking effect in the same manner as the powers of the Act. See note to s. 20.

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XIII.—LIMITED OWNERS GENERALLY.

Enumeration of other limited owners, to have powers of tenant for life.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

"Possession."

"Possession" in this s. means possession properly so called as distinguished from remainder or reversion, and there is no distinction as regards a person in possession personally or by his guardian if an infant: *Re Morgan*, 24 Ch. D. 114, 116; *Re Jones*, 26 *ib.* 736, 744; *Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 423, and see s. 2 (5).

"Possession" includes receipt of rents and profits (s. 2 (10) (i.)), so that a lease does not prevent the estate or interest being in possession.

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

As to certain unbarrable entails.

This subs. extends the benefits of the Act to tenants in tail under Acts of Parliament ("settlement" includes "Act of Parliament," s. 2 (1)), which restrain a bar of the entail. It also enables a sale where a bar of the estate tail is prevented by the Act 34 & 35 Hen. 8, c. 20 (as to which see Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 18). It also, in connection with subs. (iii.) enables the Crown reversion in Ireland under a grant from the Crown to be bound, though the tenant in tail cannot bar it by enrolled deed (see 4 & 5 Will. 4, c. 92, s. 12 (Fines and Recoveries Act, Ireland)), as he can in England under the English Act (s. 15) where the case is not within the Act of Hen. 8. But then under s. 22 (5) and s. 21 of this Act the money not spent in improvements, or the land acquired with it, must be settled in the same manner as the land sold, and will become inalienable, or subject to a reversion in the Crown, as the case may be (see note to subs. iii.). The Act does not apply to lands purchased with money provided by Parliament for public services. Thus the estates settled on the Dukedoms of Marlborough and Wellington and the Earldom of Nelson cannot be sold under this Act. But the lands settled on the Earldoms of Shrewsbury and Abergavenny, and all lands which have hitherto become inalienably entailed under the Act 34 & 35 Hen. 8, c. 20, can now be sold.

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:

Instance of executory devise.

Where there was a devise upon trust to pay the rents to the testator's wife for the maintenance of his son until twenty-one, and then upon trust for him absolutely, but if he should die under twenty-one without leaving issue, then upon trust for the wife for life, and after her death upon other trusts, it was held that under this subs. (ii.) the infant son was in the position of a tenant for life, being tenant in fee simple with an executory limitation over, and the trustees of the will

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were appointed trustees for the purposes of the Act: *Re Morgan*, 24 Ch. D. 114; *Re James*, 32 W. R. 898; W. N. 1884, 172.

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

This subs. requires to be considered under two aspects. First, there may be a person entitled to the whole base fee. Then the deed under which he acquired that fee and the original grant from the Crown together form the settlement, and trustees for the purposes of this settlement must be appointed. Then the fee simple can be sold free from the reversion in the Crown, but except for re-investment in the purchase of land the trustees cannot properly part with the money without the concurrence of the Crown, and on re-investment the trustees should see that the reversion is limited to the Crown. Secondly, the base fee may be itself settled. Then trustees may be appointed either (1) of the settlement of the base fee only, in which case on a sale by the tenant for life the base fee only is sold and the Crown's reversion is untouched, or (2) trustees may be appointed of the whole settlement of the fee simple including the settlement of the base fee and grant from the Crown, in which case a sale bars the Crown's reversion, and then also the trustees cannot properly part with the money without the concurrence of the Crown except for re-investment in land.

Crown reversion in Ireland.

This subs. will have an important effect in Ireland, where there are large tracts in which the Crown has a reversion on a base fee. The tenant for life will now be able to sell free from this reversion, provided trustees are appointed of the whole settlement, including the grant from the Crown, in which case however the trustees may feel difficulty in parting with the purchase-money except for re-investment in land without consent of the Crown. The only mode of barring the Crown's reversion is by a sale through the Landed Estates Court (12 & 13 Vict. c. 77, s. 27). It is conceived that there are many cases in England where the fact that a perpetual entail exists under the Act 34 & 35 Hen. 8, c. 20, has been altogether lost sight of. If the Crown grant be before that Act, a recovery before the Act barred the issue but not the Crown's reversion (*Neal* v. *Wilding*, 1 Wilson, 275), and after the Fines and Recoveries Act the reversion also could be barred, and thus a complete title obtained. In many cases it may be difficult to ascertain whether the entail is subsisting or not.

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

A person entitled to receive rent of freehold land during the subsistence of a lease for years thereof, if he should so long live, is not tenant for life within the meaning of this subs. (*Re Hazle*, 26 Ch. D. 428, affirmed 29 *ib.* 78).

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(v.) A tenant for the life of another not holding merely under a lease at a rent:

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

Infant entitled at twenty-one with trust for maintenance.

Where a testatrix appointed real estate to trustees upon trust to sell and invest and to use so much of the annual income as should be required for the maintenance and education of her son and daughter (who were both infants) and to accumulate the remainder of the income, and when her son should attain twenty-one to pay him one moiety of the principal money and interest, and to pay to her daughter the other moiety when she should attain that age or marry; it was held that the infants were tenants for life under this Act: *Re Powell, Allaway* v. *Oakley*, W. N. 1884, 67. A devise to A. so long as he resides a specified time and then over, makes him tenant for life within this subs.: *Re Paget*, 30 Ch. D. 161. A discretionary trust in trustees during the life of A. to pay the rents for the benefit of A. and his wife and children (there being children in existence), does not make them a tenant for life under this subs.: *Re Atkinson, Atkinson* v. *Bruce*, 30 Ch. D. 605, affirmed 31 *ib.* 577; and a trust to accumulate for twenty years and then to convey to uses under which an existing person, if then living, would be tenant for life does not make him a present tenant for life within the Act: *Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 423, and see *Re Horne*, 39 Ch. D. 84.

Limitation over on non-residence.

Discretionary trust.

Trust to accumulate.

(vii.) A tenant in tail after possibility of issue extinct:

(viii.) A tenant by the curtesy:

Tenant by the curtesy.

Where the wife takes the fee under a conveyance or will, that would be a settlement within the definition of settlement: s. 2 (1), and under S. L. A., 1884, s. 8, an estate by the curtesy in cases of descent as well as conveyance is to be considered as arising under a settlement made by the wife.

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

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Subject to a term for raising money there was a devise to the use of trustees during the life of A. upon trust to enter into possession, and manage and pay expenses and outgoings and an annuity, and pay the balance of the rents to A. during his life. The balance amounted to a very small sum. It was held that A. had under this subs. the powers of a tenant for life: *Re Jones*, 24 Ch. D. 583, affirmed 26 *ib.* 736; see also *Re Clitheroe*, 28 Ch. D. 378, affirmed 31 *ib.* 135; *Re Cookes*, *Cookes* v. *Cookes*, W. N. 1885, 177.

"Entitled to the income of land" means entitled under the limitations of the settlement without regard to incumbrances: *per* Cotton, L.J., *Re Jones*, 26 Ch. D. 738; and means absolutely, not contingently, entitled: *Re Horne*, 39 Ch. D. 84. A trust to repair does not prevent the equitable tenant for life from being let into possession upon an undertaking to repair: *Re Bentley*, *Wade* v. *Wilson*, 54 L. J. Ch. 782, 33 W. R. 610.

Effect of trust for repairs.

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

The general effect of this s. is that, in all the preceding provisions of the Act each limited owner here mentioned is to be considered as also inserted wherever tenant for life is mentioned, and all consequential provisions as to trustees, the Court and other matters apply to the case of each such limited owner "as if each of them were a tenant for life" (subs. 1), as well as to the case of a tenant for life.

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XIV.—INFANTS; MARRIED WOMEN; LUNATICS.

Infant absolutely entitled to be tenant for life.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

"Land" means land of any tenure (13 & 14 Vict. c. 21, s. 4), so that this s. includes copyholds and leaseholds as well as freeholds.

Appointment of person to exercise powers of infant.

The s. applies only to an infant absolutely entitled: *Re Horne*, 39 Ch. D. 84. Where an infant was entitled as heir-at-law to an undivided share, the Court appointed a person to exercise the powers of

the Act on his behalf on a sale of the entirety, but refused to appoint for that purpose a co-owner: *Greenville's Estate*, 11 L. R. Ir. 138; and the sale may be made out of Court: *Re Price, Leighton* v. *Price*, 27 Ch. D. 552. SS. 59, 60, 61 — INFANTS; MARRIED WOMEN; LUNATICS.

A share to which an infant becomes entitled in possession on an intestacy, of partnership land, is within the meaning of this s.: *Re Wells*, 31 W. R. 764; W. N. 1883, 111. Partnership land.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. Tenant for life, infant.

Under 49 & 50 Vict. c. 27 the mother may appoint a guardian. A widow is now always guardian of her infant children either alone or jointly with the guardians appointed by the father. Guardian.

The effect of this s. is not to take away the powers of an infant being tenant for life, or having the powers of a tenant for life under s. 59, but to enable the appointment of persons to exercise them on his behalf. This is important in construing ss. 61, 62.

During the infancy of a person in the position of a tenant for life, any consent by him required under this Act must be given by the trustees: *Re Duke of Newcastle*, 24 Ch. D. 129. Consent of infant.

A sale may be made by persons appointed under this s., though there are no trustees of the settlement within the meaning of this Act, but the purchase-money must be paid into Court: *Re Dudley*, 35 Ch. D. 338. Sale though no trustees.

An infant who takes a vested estate, liable to be divested on his death under the age of twenty-one, is within this s.: *Re James*, W. N. 1884, 172; 32 W. R. 898.

For form of summons for the appointment of persons to exercise powers on behalf of an infant see S. L. A. Rules, Form XXII. (Chap. VI., *infra*.) Appointment of trustees for purposes of s. 60.

In the case of *Re Wells* (31 W. R. 764; W. N. 1883, 111), an appointment of trustees was made on the application of a next friend; and see *Greenville's Estate* (11 L. R. Ir. 138, note to last s.).

See upon this s. *Re Powell*, W. N. 1884, 67, note to s. 58 (vi.).

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman. Married woman, how to be affected.

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(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

Judicial separation or protection order.

A decree for judicial separation under 20 & 21 Vict. c. 85, ss. 7, 25, or a protection order under s. 21 of that Act and 21 & 22 Vict. c. 108, ss. 6, 8, or under 41 & 42 Vict. c. 19, s. 4, constitutes the married woman a *feme sole*, and she, as tenant for life, thereby becomes entitled to sell without the concurrence of her husband. A judicial separation only makes her a *feme sole* as from the date of the decree or order (20 & 21 Vict. c. 85, s. 25), and the estate for life must have been acquired whether in possession or reversion after that date: *Waite* v. *Morland*, 38 Ch. D. 135. But under 21 & 22 Vict. c. 108, s. 8, a protection order makes her a *feme sole* as to an estate for life which falls into possession after the date of the order though she was previously entitled in remainder: *Re Whittingham*, 12 W. R. 775; *Re Insole*, L. R. 1 Eq. 470.

An order under s. 91 of the Fines and Recoveries Act affords no assistance. It does not affect the husband's rights and does not enable a conveyance under a joint power: *Re Eden*, 28 L. J. N. S. C. P. 5.

Every estate for life acquired by a married woman after 1882 is now acquired by her as a *feme sole* under the M. W. P. A., 1882.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

This s. does not enable a married woman who is an infant to exercise the powers of the Act, the disability of infancy remains, notwithstanding coverture, and ss. 59 and 60 apply (*Hearle* v. *Greenbank*, 3 Atk. 695; Sug. Powers, 177, 8th ed.), unless the intention is clear that the power should be exercised during minority: *Re Cardross*, 7 Ch. D. 728; *Re D'Angibau*, 15 *ib.* 228. The effect of subs. 4 is to make all the previous sections of the Act read as if the expression "tenant for life" had been, in the case of a married woman entitled for her separate use, or as a *feme sole*, replaced by "married woman tenant for life," and had been in any other case replaced by "married woman tenant for life together with her husband."

Infant married woman.

Subs. 5 expressly authorizes the married woman to execute the powers of the Act by deeds and instruments which (as in the case of other powers to be exercised by deed) will not require acknowledgment: Sug. Powers, 153, 8th ed. In fact, acknowledgment is by the Fines and Recoveries Act confined to dispositions authorized by that Act, and cannot apply to any other disposition unless expressly made necessary. By the M. W. P. A., 1882, acknowledgment has ceased to be required in the case of women married after 1882, and in the case of property acquired by a married woman after 1882 without regard to the date of her marriage.

Acknowledgment unnecessary.

The only case in which the concurrence of the husband becomes necessary is where both the marriage and the settlement are before 1883, and the wife is not entitled for her separate use. Where she is so entitled, even though the legal estate for life be in the husband in right of the wife, still his concurrence is not necessary. He is a trustee for her. The equitable tenant for life is full tenant for life for the purposes of the Act (s. 58 (ix.)), and can pass the legal estate.

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

Tenant for life lunatic.

In *Re Gaitskell* (40 Ch. D. 416) the committee of a lunatic tenant in tail was authorized to take proceedings under this s. to sell his undivided shares to a co-owner of the other shares.

A lunatic not found so by inquisition cannot dispose of his fee simple and, nor does the Act enable the disposal by him of land of which he

Lunatic infant.

SS. 62, 63.

INFANTS; MARRIED WOMEN; LUNATICS.

is tenant for life, but if the lunatic be also an infant then ss. 59 and 60 apply, as the ordinary jurisdiction in case of infants is not ousted unless there be a commission of lunacy: *Beall* v. *Smith*, 9 Ch. Ap. 85, 92; *Re Edwards*, 10 Ch. D. 605. The same principle applies where a tenant in tail, who is a person having the powers of a tenant for life, s. 58 (1) (i.), is a lunatic and also an infant, and see note to s. 60. In the case of a married woman, where her husband, who has an estate in her right, and whose concurrence is necessary under s. 61 (3), is a lunatic, the powers of the Act cannot be exercised unless under a commission; but if the married woman is entitled for her separate use, or as a *feme sole*, then she alone can exercise the powers of the Act (s. 61 (2)), and in any case if she is an infant s. 59 or 60 applies.

Married woman.

Notice under s. 45 in case of lunatic.

In the case of a lunatic, as well as of any other tenant for life, notice under s. 45 must be served upon the trustees, and if necessary, trustees must be appointed for the purposes of the Act: *Re Taylor*, 31 W. R. 596; W. N. 1883, 95.

An order in lunacy is necessary to enable the committee to give the notice required by s. 45: *Ray's Settled Estates*, 25 Ch. D. 464.

SETTLEMENT BY WAY OF TRUSTS FOR SALE.

XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

Provision for case of trust to sell and re-invest in land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so

entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

The trust or direction for sale under this subs. must be for immediate sale: *Re Horne*, 39 Ch. D. 84.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direc-

S. 63.

SETTLEMENT BY WAY OF TRUSTS FOR SALE.

tion given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

Amendment by S. L. A., 1884, s. 6.

The effect of this section was to prevent trustees for sale selling without the consent of persons who might be tenants for life of the proceeds of sale. This difficulty has been removed by the S. L. A., 1884, s. 6 (1) *infra*.

What is a settlement under s. 63.

In determining whether land vested in trustees on an absolute trust for sale is subject to the provisions of this s. the Court looks simply at the instrument or instruments which originally created the trust; any subsequent sub-settlements of shares of the sale money are not taken into account: *Earle and Webster's Contract*, 24 Ch. D. 144.

XVI.—Repeals.

Repeals.

Repeal of enactments in schedule.

64.—(1.) The enactments described in the schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

The only parts of Lord Cranworth's Act (23 & 24 Vict. c. 145) here repealed which are not re-enacted, are the provisions for the renewal of leases and for raising money on renewals. But those provisions have in effect been re-enacted by the Trustee Act, 1888 (51 & 52 Vict. c. 59) ss. 10, 11, *supra*, p. 174.

The repeal of the Improvement of Land Act, 1864, renders it much easier to borrow under that Act for improvements. This Act does not enable borrowing for that purpose.

XVII.—Ireland.

Ireland.

Modifications respecting Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

(5.) General Rules for purposes of this Act for Ireland

S. 65.

IRELAND.

40 & 41 Vict. c. 57.

shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exercisable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

40 & 41 Vict. c. 56.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exercisable by those Courts under this Act.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

THE SCHEDULE.

REPEALS.

23 & 24 Vict. c. 145, in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	in part; namely,—
	Parts I. and IV.	
	(being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881) (*a*).	
27 & 28 Vict. c. 114, in part.	The Improvement of Land Act, 1864	in part; namely,—
	Sections seventeen and eighteen:	
	Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the land owner" to "minor or minors" (inclusive); and "or circumstance" (twice):	
	Except as regards Scotland.	
40 & 41 Vict. c. 18, in part.	The Settled Estates Act, 1877,	in part; namely,—
	Section seventeen.	

(*a*) But ss. 8 and 9 of 23 & 24 Vict. c. 145, have been in part re-enacted by 51 & 52 Vict. c. 59, ss. 10 and 11, *ante*, p. 174.

Improvement of L. A., 1864, s. 21, as altered by S. L. A.

In case of dissent, or when landowner's infant children are to be protected, Court of Chancery or Session may authorize Commissioners to proceed.

NOTE.—Sect. 21 of the Improvement of Land Act, 1864, as it now stands, is as follows:—

21. If and when any Dissent from any such Application to the Commissioners for their Sanction of proposed Improvements shall have been notified in Writing to the Commissioners, by the Commissioners, Trustees, Company, or other Body or Individuals interested in any River or Canal which would or might be interfered with as hereinbefore mentioned, the Landowner desiring such Improvements may apply to the High Court of Chancery in *England* or *Ireland* where such Lands are situate in *England* or *Ireland* respectively, or to the Court of Session where such Lands are situate in *Scotland*, for an Order of such Court authorizing the Commissioners to entertain and proceed upon the Application for such proposed Improvements notwithstanding such Dissent; and such Application shall be made, as to Lands in *England*, to the Master of the Rolls or any one of the Vice Chancellors sitting at Chambers, by Summons, calling on the Party dissenting to show Cause why such Order should not be made; as to Lands in *Ireland*, to the Master of the Rolls, by summary Petition or otherwise, as he shall by any General Order direct; and as to Lands in *Scotland*, to either Division of the Court of Session in Time of Session, or to the Lord Ordinary sitting on Bills in Time of Vacation, by summary Petition; and the Court or single Judge, as the Case may be, to whom such Application shall be made, shall hear and determine such Application, and for that Purpose shall have Power to make or direct to be made all such Inquiries, and receive and entertain all such Statements and Evidence, on Oath or by Affidavit, as such Court or Judge may consider necessary or desirable, or as may be produced before them or him; and if upon a Consideration of all the Circumstances such Court or Judge shall be of opinion that the Commissioners should entertain and proceed upon such Application, an Order shall be made authorizing and requiring them to proceed thereon, and to deal with the same according to the Provisions of this Act authorizing them in that Behalf, notwithstanding such Dissent aforesaid: Provided that if at any Time after Notification of such Dissent, and before any such Order shall have been applied for and made as aforesaid, such Dissent shall be withdrawn by a like Notification in Writing, it shall not be necessary to make or proceed with such Application, or to obtain such Order.

CHAPTER III.

THE SETTLED LAND ACT, 1884.

47 & 48 VICT. c. 18.

An Act to amend the Settled Land Act, 1882.

[3rd July, 1884.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: SS. 1, 2, 3, 4, 5.

1. This Act may be cited as the Settled Land Act, 1884. Short title.

2. The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882. Interpretation.

3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein. Construction of Act.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act. Fine on a lease to be capital money.

5. (1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf. Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges,

SS. 5, 6.

partitions, or leases effected, or in progress, or immediately intended.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

Subs. (1) only applies to the case of a sale, exchange, partition, or lease. Specific notice within the meaning of *Ray's Settled Estates*, 25 Ch. D. 464, is still necessary as to a mortgage or charge. Sale includes an enfranchisement within the Act of 1882, s. 3 (ii.).

Under s. 44 of the Act of 1882, a trustee can apply to the Court for any particulars or information, and a tenant for life improperly refusing would be liable to costs. The cost of furnishing particulars and information being costs of the trust will be payable out of capital.

Under subs. (3) the waiver or acceptance to be complete must be by all the trustees, if more than one, and will include the required notice to the solicitor of the trustees, which is merely a secondary notice to the trustees.

As to consents of tenants for life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act.

(3.) This section applies to dealings before, as well as after, the passing of this Act.

Subs. (1) applies only to the case of land held on trust for sale dealt with by s. 63 of the Act of 1882, and if there be no order under s. 7 of this Act the trustees can now perform the trusts in the same manner as before the Act of 1882.

By subs. (2) the object of s. 56 (2) of the Act of 1882 is attained by making the consent of one only of several concurrent tenants for life sufficient. The consent of several persons taking concurrently, required by s. 2 (6) and s. 56 (2), caused an unnecessary hindrance.

Powers given by s. 63 to be exercised only with leave of the Court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

(i.) Those powers are not to be exercised without the leave of the Court.

(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

(iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section,

S. 7.

unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

(vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

(x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

The result of this s. is that:—

(1.) The tenant for life must, before exercising a power under s. 63, obtain leave of the Court, and after leave given, the trustees are not to exercise any power to which the leave extends. This will prevent concurrent conflicting powers. The leave will be obtained on summons.

(2.) The order giving leave will be registered as a lis pendens. If a purchaser does not find any lis pendens registered he will know that the trustees are free to deal.

(3.) The lis pendens will be registered against the trustees, as "Trustees under the S. L. A., 1882," so that the nature of the order is shewn, and the registration will not affect them in their dealings with their own property.

(4.) The order will also describe the person to whom leave is given as being tenant for life, which is made conclusive as to his having that character, and absolves a purchaser from inquiring into the trusts affecting the sale money. In this way the title to the money will not come on the title to the land.

A tenant for life does not in general require the powers conferred by s. 63 of the Act of 1882. That s. was only required to prevent settlements being made by way of trust for sale to evade the preceding part of the Act.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

Curtesy to be deemed to arise under settlement.

See note to S. L. A., 1882, s. 58 (1) (viii.), p. 289.

In applying to the Court under this s. the title of the proceedings will be, "In the matter of, &c., settled by a settlement made within the meaning of the Settled Land Act, 1884, s. 8, by A. B., deceased, the late wife of C. B." The date must necessarily be omitted. See S. L. A. Rules, Form I., Chap. VI., *infra*.

CHAPTER IV.

S. 1.

THE SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

50 & 51 VICT. c. 30.

An Act to amend the Settled Land Act, 1882.

[23rd August, 1887.]

45 & 46 Vict. c. 38.

WHEREAS by the twenty-first section of the Settled Land Act, 1882 (in this Act referred to as the Act of 1882), it is provided that capital money arising under that Act may be applied in payment for any improvement by that Act authorised:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of s. 21 of the S. L. A., 1882.

1. Where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.

This Act was consequent on the decision in *Re Knatchbull*, 27 Ch. D. 349, 29 *ib.* 588.

Capital must not be applied in payment of any portions of an instalment which represent interest: *Re Lord Sudeley*, 37 Ch. D. 123.

S. 28 of S. L. A., 1882, to apply to improvements within preceding s.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

Short title.

3. This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts (Amendment) Act, 1887.

CHAPTER V.

S. 11.

THE HOUSING OF THE WORKING CLASSES ACT, 1885

(48 & 49 VICT. c. 72), s. 11, SUBS. (1).

Amendment of 45 & 46 Vict. c. 38, as to buildings for working classes.

11.—(1.) The Settled Land Act, 1882, shall be amended as follows:—

(*a.*) Any sale, exchange, or lease of land in pursuance of the said Act, when made for the purpose of the erection on such land of dwellings for the working classes, may be made at such price, or for such consideration, or for such rent, as having regard to the said purpose, and to all the circumstances of the case, is the best that can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.

(*b.*) The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act, and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

The last clause seems to imply that in every case the opinion of the Court must be obtained that the expenditure is not injurious to the estate; at least, it will not be prudent for trustees to omit to do so.

CHAPTER VI.

THE SETTLED LAND ACT RULES, 1882.

December, 1882.

1. The expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

2. All applications to the Court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

Cost of petition.

[NOTE.—Costs of a petition were allowed in *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541; *Re Arnold*, 31 Sol. J. 560; *Ex parte Jesus College*, 50 L. T. 583; and *Re Earl de Grey*, W. N. 1887, 241.]

3. The forms in the Appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form I. in the Appendix.

4. The persons to be served with notice of applications to the Court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for

life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, Form XXIII.) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served.

Time for application.

[Notes.—The proper time for an application under this rule in regard to the appointment of new trustees, is after a summons for their appointment has been taken out, but where an action had been commenced and an injunction obtained to restrain an intended sale by the tenant for life until trustees for the purposes of the Act had been appointed, an order as to the service of notice of the summons was made before the summons was taken out: *Wheelwright* v. *Walker*, 23 Ch. D. 763.

Service dispensed with.

Service on the children of the tenant for life was dispensed with, where the Court deemed their interests sufficiently represented by the trustees, who had been served: *Re Brown's Will*, 27 Ch. D. 180.]

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix.

8. Any sale authorized or directed by the Court under the Act, shall be carried into effect out of Court, unless the judge shall otherwise order, and generally in such manner as the judge may direct.

9. Where the Court authorizes generally the tenant for life to make from time to time leases or grants for building

or mining purposes under section 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorizes any such lease or grant in any particular case, or where the Court authorizes a lease under section 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

10. Any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into Court. (Appendix, Forms IX., X., XI.)

11. The summons shall be supported by an affidavit setting forth:—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into Court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into Court may contain directions for investment of the money on any securities authorized by section 21, sub-section 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested.

13. Money paid into Court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money

arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms IX., X., and XI.).

14. Any person paying into Court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into Court.

[NOTE.—It is submitted that this rule, 14, is *ultra vires*. The whole purchase money must under the Act be paid to the trustees and a receipt given or it must be paid into Court, otherwise the estate will not pass by the conveyance. This is the old rule in case of an exercise of an ordinary power (*Cockerell* v. *Cholmeley*, 1 Clarke & Fin. 60) and must apply to a sale under this Act. When the whole money has been paid to the trustees any costs properly payable can then be paid.]

15. In all cases not provided for by the Act or these rules, the existing practice of the Court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Courts as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to Court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

APPENDIX (1).

Form I.

Title of Proceedings (2).

In the High Court of Justice,
Chancery Division,
Vice-Chancellor Bacon,

or

Mr. Justice Chitty,

[*or other judge before whom the application is to be heard.*]

In the matter of the estate [*or*, of the timber upon the estate], situate at in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the Will of dated *or as the case may be.*]

And in the matter of the Settled Land Act, 1882.

Form II.

Formal Part of Summons.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of 18 , at o'clock in the forenoon, on the hearing of an application

(*a.*) On the part of *A. B.*, the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of *A. B.*, the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant, by *X. Y.*, his testamentary guardian [*or*, guardian appointed by order dated the *or*, next friend].

Or, (*c.*) On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or, (*d.*) On the part of *G. H.*, the tenant for life in remainder [*or*,

---

(1) The Appendix referred to in the preceding rules under S. L. A.

(2) See W. N. 1884, Part 2, p. 90, and *Re Parry*, *ib.* Part 1, p. 43.

tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case be*].

Or, (*e.*) On the part of *I. J.*, the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Or, (*f.*) On the part of *I. J.*, the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned Act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (*g.*) On the part of *I. J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of *K. L.*, interested under the contract hereinafter mentioned.

Dated the day of 18

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons* (*if any*) *on whom the summons is to be served.*)

Form III.

Summons under S. 10 for General Leasing Powers.

Title and formal parts as in Forms I. and II. (*a*) or (*b*).

1. That the applicant [*or in the case of an infant* that the said *X. Y.* during the infancy of the said *A. B.*], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said *A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to section 10 of the said Act be authorised from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said Act [*or* on other conditions than those specified in sections 7 to 9 of the said Act.]

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

FORM IV.

SUMMONS UNDER SS. 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHERE THE TENANT FOR LIFE HAS ENTERED INTO A CONTRACT.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said *X. Y.*) of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the said *A. B.* [*or X. Y.*] may be authorised to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

FORM V.

SUMMONS UNDER SS. 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion-house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned Act, be approved, and that the applicant [*or* the said *X. Y.*] may be authorised to execute the same.

2. (*Add application for costs as in Form III.* 2.)

FORM VI.

SUMMONS UNDER SS. 15, 35, OR 37 FOR A SALE OUT OF COURT OF THE PRINCIPAL MANSION-HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the applicant [*or in the case of an infant* the said *X. Y.*] may be authorised to sell the principal mansion-house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act], *or if this Form is not applicable as in Form III.* 2.

FORM VII.

SUMMONS UNDER SS. 15, 35, OR 37 FOR SALE BY THE COURT OF THE PRINCIPAL MANSION-HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the principal mansion-house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement, may be sold under the direction of the court.

2. (*Application for costs as in Form III.* 2.)

FORM VIII.

AFFIDAVIT VERIFYING TITLE.

Title as in Form I.

I of make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A. B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over, *or as the case may be.*]

2. (*If it is a fact.*) The said *A. B.* is an infant of the age of years or thereabouts.

3. *C. D.* of and *E. F.* of are Trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be Trustees thereof for purposes of the above-mentioned Act.]

FORM IX.

SUMMONS UNDER S. 22 BY PURCHASER FOR PAYMENT INTO COURT OF PURCHASE MONEY OF SETTLED LAND, TIMBER, OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. (*e*).

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the and made between [*or* will, &c.] proceeds of sale of the A. estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase money of the said A. estate (*or as the case may be*) settled by the said settlement [*or* will, &c.]

2. That such directions may be given for the investment of the said sums when paid into court, and the accumulation or payment of the dividends of the securities, representing the same as the court may think proper.

FORM X.

SUMMONS UNDER S. 22 FOR PAYMENT INTO COURT BY LESSEE UNDER A MINING LEASE (*see* S. 11).

Title as in Form I.

Formal parts as in Form II. (*f*).

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement dated the and made between [*or* the will, &c.] mineral rents under lease dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the less £ the costs of payment into court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to *A. B.*, the tenant for life under the above-mentioned settlement during his life or until further order.

FORM XI.

SUMMONS UNDER S. 22 FOR PAYMENT INTO COURT BY MORTGAGEE (*see* S. 18).

Title as in Form I.

Formal parts as in Form II. (*g*).

1. That the applicant may be at liberty to pay into court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or* the will, &c.] and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2.)

FORM XII.

SUMMONS UNDER S. 26 (1).

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

FORM XIII.

SUMMONS UNDER S. 26, SUBS. (2) (ii.) FOR APPOINTMENT OF AN ENGINEER OR SURVEYOR.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That *M. N.* of engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26, sub-section (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XIV.

NOMINATION OF AN ENGINEER OR SURVEYOR BY THE TRUSTEES.

Title as in Form I.

We *C. D.* of and *E. F.* of the Trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate of engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii.) of the said Act.

(Signed) *C. D.*
E. F.

FORM XV.

SUMMONS UNDER S. 26, SUBS. (2) (iii.).

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That *C. D.* and *E. F.*, the Trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XVI.

SUMMONS UNDER S. 26, SUBS. 3.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the sum of £ may be ordered to be raised out of the in court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the .

2. (*Add application for costs as in Form III.* 2.)

FORM XVII.

SUMMONS UNDER S. 31.

Title as in Form I.

Formal parts as in Form II. (*a*) or (*b*).

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

FORM XVIII.

SUMMONS UNDER S. 34 FOR APPLICATION OF MONEY PAID FOR A LEASE OR REVERSION.

Title as in Form I.

Formal parts as in Form II., (*a*), (*b*), or (*d*).

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest, describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the court may think fit.

2. (*Add application for costs as in Form III.* 2.)

FORM XIX.

SUMMONS UNDER S. 38 FOR THE APPOINTMENT OF NEW TRUSTEES.

Title as in Form I.

Formal parts as in Form II. (*a*), (*b*), (*c*), or (*d*).

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XX.

SUMMONS UNDER S. 44.

Title as in Form I.

Formal parts as in Form II. (*a*), (*b*), or (*c*).

1. That it may be declared that (*set out the declaration required*).
2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

FORM XXI.

SUMMONS UNDER S. 56 FOR ADVICE AND DIRECTION.

Title as in Form I.

Formal parts as in Form II. (*a*) to (*h*).

For the opinion, advice, and direction of the Judge on the following questions:—

1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts*)

for the opinion, advice, and direction of the Judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III.* 2.)

FORM XXII.

SUMMONS UNDER S. 60 FOR APPOINTMENT OF PERSONS TO EXERCISE POWERS ON BEHALF OF INFANT.

Title as in Form I.

Formal parts as in Form II. (*b*).

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.
2. (*Add application for costs as in Form III.* 2.)

FORM XXIII.

SUMMONS FOR DIRECTIONS AS TO SERVICE OF A PETITION.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of 18

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